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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 353

ALPHONSE LEWIS, JR.,
Petitioner,

vs.

No. 15,669

CITY OF GRAND RAPIDS, MICHIGAN, WILLIAM A. JOHNSON, Superintendent of Grand Rapids Police Department, their commissioners, officials, officers, attorneys, agents, employees and any others acting for, with or in concert with any of them, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. _____

ALPHONSE LEWIS,
Petitioner,

vs.

CITY OF GRAND RAPIDS, MICHIGAN, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered in the above-entitled cause on February 16, 1966, rehearing having been denied on April 7, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is set forth at Appendix B, infra p.p. 1c-84c, and reported at 222 F. Supp. 349. The opinion of the Court of Appeals, printed in Appendix C, infra, p.p. 85c-123a, is reported at 356 F. 2d 276.

Appellee's Supplemental Appendix to the printed record in the Court of Appeals is printed as Appendix A with the pages continued from the main Appendix.

9 copies of the record have been filed under Rule 21 (4).

JURISDICTION

The judgment of the Court of Appeals was entered February 16, 1966. Petition for rehearing was denied April 7, 1966. This Court's jurisdiction is invoked under 28 U.S.C., Sec. 1254(1). An Order entered July 5, 1966 extended the time in which to file Petition for Writ of Certiorari to July 15, 1966.

QUESTIONS PRESENTED

I. Is a fair or due process hearing required before a municipal licensing authority can deny the transfer of a liquor license to an applicant who has an officially approved and substantial financial interest in said business?

II. Can the factual findings and conclusions of the District Court that the Equal Protection Clause of the Fourteenth Amendment has been violated by a municipal licensing authority by failure to provide a fair or due process hearing under state law be reversed by the Court of Appeals where there is substantial evidence to support the District Court's findings?

III. Does the Due Process Clause of the Fourteenth Amendment apply to liquor licensing as squarely determined by *Hornsby v. Allen,* 326 F. 2d 605 (C.A. 5, 1964) and *Minkhoff v. Payne,* 210 F. 2d 689 (C.A. D.C. 1953) and squarely rejected by the 6th Circuit Court of Appeals in this case?

IV. Does the Court of Appeals decision in this case conflict with the United States Supreme Court's decisions in *Schware v. Board of Bar Examiners,* 353 U.S. 232, 1 L. Ed. 2d 796 (1957), *Goldsmith v. United States Board of Tax Appeals,* 270 U.S. 117 (1926), *Greene v. McElroy,* 360 U.S. 474, 3 L. Ed. 2d 1377 (1959) and *Willner v. Committee on Character and Fitness,* 373 U.S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d, 224 (1962)?

V. Whether petitioner was denied Equal Protection of the law by use of unrecorded reasons in separate record "identified as the causes" for disapproval?

VI. Is a Negro attorney's rights under the Fourteenth Amendment in applying for transfer of a liquor license violated by claim of defendants that no attorney should be a liquor licensee, where records show all Negro attorney-applicants are disapproved and white attorney-applicants are approved and the only two denials of non-Negro applicants have been one for making a critical statement about the police and the other for "political" reasons?

VII. Whether the Court of Appeals erred in reversing findings of the District Court based on facts developed in six weeks trial where District Court holds that plaintiff was denied Due Process and Equal Protection of the law by racial and invidious discrimination and arbitrary and capricious denial (without reasons) for non-transfer of a liquor license?

STATEMENT OF THE CASE

Petitioner, Alphonse Lewis, Jr., a Negro attorney, was hired by Patricia Ettress, after several other lawyers failed, to secure the return of Class C liquor business (Barnett's Bar) from the previous licensee although "stops" for more than $10,000 in federal taxes (63b) and the 1958 and 1959 Grand Rapids city personal property taxes (299a) were owed by said previous licensee.

In May of 1959 the Liquor Control Commission approved an agreement by which petitioner would finance the opening of said bar by Patricia Ettress. On May 15, 1959 the Grand Rapids Police Department filed an LCC form 1800 approving petitioner as manager (6b). On May 20, 1959 petitioner and Patricia Ettress entered into a chattle mortgage and a management and legal services contract providing for petitioner to receive a certain percentage of the business as compensation during the two year term of said contract with a minimum of $2000.00 per year (87c). This agreement was made part of the Liquor Control Commission file. At the time petitioner secured the license for Patricia Ettress, the Liquor Control Commission files show that there was a "violation pending" and Internal Revenue and Michigan Employment

Security Commission "stop" (227a). This latter fact takes on significance in this cause because of later use of similar stops by the defendants in this cause against petitioner.

The licensee Patricia Ettress ran the bar during the day and was day bartender and one Wesley Calloway, a boy friend, got the receipts from the night employees (149b).

In August of 1960 during a temporary absence of Patricia Ettress the Grand Rapids Police Department conducted a raid on the building in which the bar, a restaurant and a hotel were located because of suspected gambling activities in the basement of the building by Wesley Calloway and another (35b). Six men including Wesley Calloway were arrested on warrants issued prior to the raid and all of these cases were later dismissed or withdrawn (7c). Another warrant however was issued against Wesley Calloway because it was alleged that at the time he was arrested he had some pieces of paper in his pocket while standing outside of the building which he threw into the middle of the street (351b). As a result of these arrests a complaint was made by the Grand Rapids Police Department to the Liquor Control Commission against Patricia Ettress the licensee. Petitioner successfully defended the criminal cases and the complaint against the licensee before the Liquor Control Commission and all charges were disposed of by October 31, 1961.

In August of 1960 shortly after the complaint, Patricia Ettress the licensee agreed without the knowledge of petitioner to sell the bar for the sum of $17,000 to one Frank Reynolds (64b, 72b). On November 10, 1960 Patricia Ettress agreed to sell to Dr. Cortez A. English, a Negro dentist, for $18,000 contingent upon the cancellation of the previous sale. Later after the Reynolds offer was rescinded and after the cancellation and expiration of the management agreement between petitioner and Patricia Ettress on or about May 15, 1961, peitioner joined Dr. English at the latter's request (34b) to become a partner with him in the operation of the business upon transfer of the license.

On or about May 29, 1961 petitioner submitted to the licensee a statement for moneys owed for capital invested

in the business the amount due for his percentage and for legal services rendered (246a, 287a, 32b).

In June 1961 Andrew Spyk, Jr., the investigator for the Liquor Control Commission who had originally handled the transfer of the license to Barnett's Bar in May of 1959 filed a report after examining the financial arrangements and statements recommending the transfer to petitioner and Dr. Cortez English (357b). On July 11, 1961 the Grand Rapids Police Department, ignoring the information that the Liquor Control Commission was aware of the complaint filed with it, filed the first form LCC 1800 disapproving the transfer because of the pending gambling violation (348b). The Police Department at this time did not send in any report to the City Commission as required by its standing rules (392b).

On or about August 25, 1961 the Department of Revenue of the State of Michigan proposed to close the bar because of Mrs. Ettress' failure to pay sales taxes but agreed to allow the bar to operate pending transfer if petitioner paid $500.00 on said taxes from his own funds and Mrs. Ettress turned over financial control and direction of the bar exclusively to petitioner (67b). At the same time an Internal Revenue agent was working with petitioner in connection with the liquidation of the federal taxes at the time of the transfer including income taxes owed by Patricia Ettress, the licensee (168b). On September 25, 1961 the Internal Revenue agent closed the bar because of the failure of Mrs. Ettress to make arrangements with reference to said taxes (36b) since the pending violations were holding up the transfer. On October 2, 1961 Wesley Calloway, Mrs. Ettress' boy friend, pleaded guilty to a misdemeanor offense of possession of gambling paraphernalia and the District Court found that "the case in which Wesley Calloway pleaded guilty did not involve a violation of the gambling laws at Barnett's Bar" (351b, 355b, 222 F. Supp. 349, 355).

On October 13, 1961 prior to the disposition of the complaint before the Liquor Control Commission, L.C.C. sent new form LCC 1800 to the Grand Rapids Police Department for approval or disapproval of the transfer. At the hearing before the Liquor Control Commission on October

31, 1961, Sgt. Charles Skuzinski, the same officer in charge of the 1960 raid on the building, completed the police investigation form LCC 1800 and indicated at the two places therefor that he *approved* and *recommended* the transfer (Ex. 3). On the same day Sgt. Skuzinski informed petitioner and the Internal Revenue agent that the form would be filed with the City Clerk's office for action by the City Commission at its next meeting (Ex. 3). This form was never filed with the City Clerk until after July 31, 1962 (329b) even though the petitioner and Internal Revenue agent made repeated trips to Sgt. Skuzinski before being told that defendant Chief of Police had told him to delay or sit on said report (322b, 323b). After this, petitioner made repeated trips to the police chief in connection with the delays and was given at least 6 or 7 excuses that are shown in Exhibit 21 (378b, 379b). One of the excuses given by the defendant Chief of Police was that the licensee either did not want to sell or maybe wanted more money for said license. On November 13, 1961 the Internal Revenue Service held a sale and in order to protect his investment and chattel mortgage petitioner purchased the rights of Internal Revenue at said sale as mortgagee (27a).

On December 5, 1961, Patricia Ettress wrote the Liquor Control Commission requesting them to return the license to the bar under the control of petitioner (381b) but Liquor Control Commission informed petitioner that it was necessary to appoint a court receiver to carry out this request.

Under Michigan law a receiver can only be appointed as an ancillary action (Appendix B), and petitioner filed a suit in the Kent County Circuit Court for specific performance of the agreement of sale of the business from the licensee.

In the meantime petitioner requested a hearing before the city Safety Committee because he was getting no cooperation from the chief of police. Upon learning of the lawsuit the Committee postponed action (74a). This lawsuit was settled by an agreement executed on March 20, 1962, and a request to the defendants for transfer, signed by the licensee and her attorney, was filed with the Chief of Police, the City Clerk and Liquor Control Commission (35b, 42b, 361b). On or about April 2, 1962, the Liquor

Control Commission returned the license to the establishment in the control of petitioner under a power of attorney, pending transfer (42b, 393b). On April 6, 1962 the license director of the Liquor Control Commission Mr. Maloney, wrote a letter to defendant Chief of Police advising him that the bar was being operated under the power of attorney and requesting that the Police Department return the form 1800 which had been sent to them on October 13, 1961 (42b).

At the next meeting of the Safety Committee considering the matter, the Chief of Police mentioned a letter dated April 10, 1962 from Mr. Nowak of the Liquor Control Commission and a letter dated April 21, 1962 from Mr. Gordon Forrell, (391b) the Internal Revenue agent heretofore referred to as having gone to the Police Department with petitioner. At the next meeting of the Committee on July 24, 1962 petitioner charged that the Chief of Police had failed to tell the petitioner or the City Commission about the existence of the letter of April 6, 1962 (314b, 379b) and that he had solicited the letter of April 12, 1962 (309b) from the Internal Revenue agent after he failed to get said agent or the City treasurer to close the bar because of unpaid taxes due from the licensee (325b). Prior to this meeting petitioner had secured a copy of the letter of April 6, 1962 and sent to all of the City Commissioners as the city Safety Committee had sent a letter dated June 7, 1962 to the Liquor Control Commission requesting said information which was contained in the letter of April 6, 1962, already in the hands of the Chief of Police (326b, 375b).

Also at the meeting of July 24, 1962, the licensee and her attorney, petitioner, his partner, the proposed transferees met to discuss the transfer and the transferees complained that no reason had ever been given for the delays or failures to transfer this license (15b, 347b). At the end of the meeting the Chief of Police was asked what his recommendation would be if the tax matters were cleared up. He recommended denial on the basis of federal taxes owed by the licensee (310b). Although the petitioner at said hearing indicated that the letter of April 6, 1962 answered the information requested in the letter

of June 7, 1962, Mrs. Evangeline Lamberts, one of the Safety Committee Members refused to accept the statements in said letters since it was not addressed to the City Commission (366b, 393b) and directed the City Clerk to write another letter requesting the same information (393b). The meeting was then adjourned for 3 weeks to secure the desired information directly from the Liquor Control Commission (45b, 84b, 150b. 393b).

On July 31, 1962 the application of petitioner and his partner was not on the agenda (111b, 163b, 164b) but Commissioner Lamberts brought up the matter without notice to the transferees and made a motion that it be disapproved and the license put in escrow (394b). The motion to deny the transfer was made on the basis of the "Police Department recommendation" (393b).

The Liquor Control Commission refused to require the license escrow (368b, 369b) and the City Safety Committee at the behest of Commissioner Lamberts ordered the City Attorney to write letters of complaint against petitioner (370b, 371b) and after the Liquor Control investigation did not proceed fast enough to satisfy her, she proposed revocation of the license in order to close the bar (162b).

In August of 1962 petitioner secured an injunction in the Kent County Circuit Court against the licensee to prevent interference with the business or the efforts of petitioner to secure transfer of the license (363b). In September of 1962 the licensee then filed bankruptcy and William Nicholls was appointed trustee and Ben DeGroot his attorney.

In October of 1962 certain so-called revocation hearings were commenced and the trustee and the petitioner were not allowed to submit any witnesses or testimony (424b). Mrs. Lamberts tried to force the trustee and petitioner to put the liquor license in escrow and upon their failure to do so, she moved that the license be revoked (406b, 407b, 408b); (98c).

The trustee in bankruptcy secured an injunction against the revocation of said license and in the meantime plaintiff filed this suit on November 19, 1962 in the United States District Court for the Western District of Michigan against the Chief of Police, the City Commission and

all concerned alleging violation of his rights under the 14th Amendment and the Civil Rights Act. After a hearing a temporary injunction was issued on November 30, 1962 and was made permanent after a six week's trial in June and July of 1963. The District Court found a denial by defendants of petitioner's constitutionally protected rights and required a transfer of said license to petitioner and his partner. The District Court held that petitioner had been denied due process and equal protection of the law in both the so-called transfer hearings as well as the revocation hearings. The Court further held that the trustee in bankruptcy was denied due process and equal protection of the law in the revocation hearings. The Court determined that the trustee in bankruptcy became the owner of Patricia Ettress' rights in the license subject to the transfer rights of the petitioner and his partner as evidenced in the Circuit Court case settlement. (222 F. Supp. 349, 69c, 70c).

The Court of Appeals for the Sixth Circuit reversed the District Court's findings of law and fact and held that the cases relied on by petitioner and the District Court were inapplicable (Appendix C).

On petition for rehearing the petitioner pointed out that among other things the Court of Appeals allowed the separate record of alleged reasons given by the City Commission for denial even though the chairman of the committee who was supposed to have given the reasons to the committee of the whole on July 31, 1962 admitted that the first time he heard any reasons given was on October 24, 1962 in the so-called revocation hearings (214b) and another commissioner named Jamo admitted that when he voted on July 31, 1962 he had heard no reasons (230b, 243b), and in spite of the fact that a tape recording of the City Commission meeting on that date (Ex. 52) indicated from comments made by the City Attorney that no reasons had been given in any report of the committee chairman. The Court of Appeals further held that there was no evidence of racial or invidious discrimination in the record (107c, 119c).

The Court of Appeals for the Sixth Circuit denied petitioner's petition for a rehearing on April 7, 1966.

An Order extending time to file Writ of Certiorari was filed on July 5, 1966 extending the time to July 15, 1956.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

INTRODUCTION

The case presents a question of substantial public importance in that the Supreme Court has not decided the question of the application of the due process clause of the 5th and 14th Amendments of the Constitution to the field of state and municipal licensing of the liquor business. It further involves a conflict of authority between the court in this case and the Court of Appeals for the Fifth Circuit which squarely decided that the due process clause of the 14th Amendment does apply along with the equal protection clause in the determination of whether or not there has been discrimination in the denial of the application for a license to engage in the liquor business. In this case there is a collateral question that the petitioner claims that due process was required by a specific state law and the Sixth Circuit Court of Appeals has heretofore held that the equal protection clause applies to the revocation of liquor licenses even before the statute was amended to specifically require due notice and proper hearing in liquor license revocation cases. The Fifth Circuit Court of Appeals in *Hornsby v. Allen,* 326 F. 2d 605 (1964) decided squarely that the due process clause of the 14th Amendment applied to the application for a liquor license. The Court of Appeals for the District of Columbia also decided this question affirmatively in *Minkhoff v. Payne,* 210 F. 2d 689 (D.C.) C.C.A., D.C. (1953). That the decision in the within case is against the better reason and modern decisions is shown in an article in the Harvard Law Review by Kenneth C. Davis "The Requirement of a Trial Type Hearing" 70 Harvard Law Review 293 quoted in *Cafeteria Workers v. McElroy,* 367 U.S. 886, L. Ed. 2d 1230 (1961).

It is petitioner's contention that the Court of Appeals in this case, in reversing the District Court, decided this case squarely in opposition to the decision of the United States Supreme Court in *Goldsmith v. United States Board of Tax Appeals,* 278 U.S. 117 (1926); *Schware v. Board of Bar Examiners,* 353 U.S. 232, 1 L. Ed. (2d) 796 (1957);

Willner v. Committee on Character and Fitness, 373 U.S. 96, 83 S. Ct. 1175, 10 L. Ed. (2d) 224 (1962). The Court of Appeals in the instant case starts out with the ancient doctrine of *Crowley v. Christensen,* 137 U.S. 86, 34 L. Ed. 620 (1890) and holds "the only inescapable rule of *Crowley* is that the denial of a hearing, in itself, would not violate the 14th Amendment." Starting from this doctrine in a criminal case on petition for writ of Habeas Corpus in which the appellant claimed that the ordinance under which he was convicted of selling liquor without a license was invalid on its face, the court in the instant case arrives at the conclusion that a decision such as *Schware* and *Willner* cannot "be read to control a case of an application for transfer of a liquor license". The Court of Appeals in the case at bar seems to regress to the so-called *privilege* doctrine to say that "traditional municipal interest in regulating the liquor business together with the problems of conducting this regulation through competent civic-minded, part-time officials, *requires the use of flexible procedures.* These *exigencies* of city management must not be disregarded", in order to obtain a fair or due process hearing. (Emphasis supplied).

The case further involves whether or not the Court of Appeals has authority to reverse the District Court's findings of fact where there was substantial evidence in a disputed fact situation to sustain the District Court's findings on the merits.

I. Where an applicant for transfer of a liquor license and business has an officially approved and substantial financial interest in said business, a fair and due process hearing is required before denial of said transfer.

It is a basic principle of our system that a person shall have the opportunity to be heard. It is the contention of petitioner that the so-called transfer hearings were discussions of facts relating to the licensee and mechanical procedures for transfer of licenses and the circumstances and details of the renewal of the license on May 8 [sic] 1962 (314b). It is further contended that a trial type of hearing was required on issues of adjudicative fact where

petitioner had invested a substantial amount of money for the starting of said business as well as additional capital.

Other courts of appeal have determined that a trial type of hearing is required before an application for a liquor license transfer can be denied. *Minkhoff v. Payne,* 210 F. 2d 689 (D.C. Cir. 1953); *Hornsby v. Allen,* 326 F. 2d 605 (1964).

The Supreme Court has heretofore decided that due process hearings are required before administrative boards can deny an applicant the right to practice accounting, law, or other calling before such board.

Goldsmith v. U. S. Board of Tax Appeals, 270 U.S. 117 (1926);
Schware v. Board of Bar Examiners, 353 U.S. 236, 1 L. Ed. 2d 796 (1957);
Willner v. Committee on Character and Fitness, 373 U.S. 96, 10 L. Ed. 2d 224 (1962);
Greene v. McElroy, 360 U.S. 474, 3 L. Ed. 2d 1377;

As stated by Prof. Davis in his article "Right of a Trial Type Hearing" 70 Harvard L.R. 193, 263, referring to the Goldsmith case (supra),

> "The facts in dispute were adjudicative facts relating to the particular individual; the reason for a trial type of hearing was therefore strongest."

State case supporting the proposition that due process is necessary to the process of judicial review is J. Cardoza's view in *People v. Walsh,* 155 N.E. 575, 578, that "such review becomes impossible if without supporting evidence or equivalent averment."

The California Supreme Court in *Facination, Inc. v. Hoover,* 264 P. 2d 656, 662 (1952) Cal. held "law contemplates justice whether it is granted as a privilege or recognized as a vested right. . . (T)he right to engage in the sale of beverages . . . may not be arbitrarily denied by the Board of Supervisors without a hearing or an opportunity on the part of the petitioner to present the merits of her application to the licensing tribunal."

State Supreme Courts are now supporting the well reasoned legal conclusion of the District Court in this case (222 F. Supp. 376, 384-388) that a due process hearing is required before denial of an application for a liquor license.

Buddy and Lloyd's Store No. 1 v. City Council, 377 P. 2d 390 (Colo);
Geer v. Smoldone, 326 P. 2d 978 (Colo.);
Munroe v. Alcoholic Beverage Control Appeal Board, 325 P. 2d 533 (Cal.);
Sheeley v. Board of County Commissioners, 325 P. 2d 275 (Colo.);
Geer v. Stathopulos, 135 Colo. 146, 309 P. 2d 606;
Martin v. Board of Supervisors, 26 P. 2d 843 (Cal. 1933);
Cf Donovan v. Clarke, 233 F. Supp. 795 (1963) (D.C.);
Reed v. Collins, 90 P. 973 (Cal. App.)

None of the cases cited herein consider the fact that the applicant here already had a financial interest in the business to be transferred.

The District Court in *Midwest Beverage Co. v. Gates,* 61 F. Supp. 688 (N.W. Ind) (1945) went so far as to call a liquor license property.

Petitioner herein paid for the original liquor license in this case and advanced other money for operation of the business. Therefore petitioner has a substantial financial investment in the licensed business and refusal to transfer same without due process amounted to destroying petitioner's investment.

Petitioner's investment was approved by the Liquor Control Commission and defendants and such approval was given after petitioner underwent the same investigation and formalities as the licensee in whose name the license was issued. The denial of the transfer in this case amounts to the same thing as the revocation. See *Glicker v. L. C. C.,* 160 F. 2d 96, C.C.A. 6, (1947).

II. Petitioner was denied due process of law under state statute and therefore denied equal protection of the law under the federal statute.

In Michigan Administrative Code which is M.S.A. 3.560(7)-3.560(18) By-Laws 48, Section 24.71-24.82. Michigan Administrative Procedures Act M.S.A. 3.560(21.1)-3.560(21.10). Compiled Laws Supplement 1956, Section 24.101-24.110. Section 3.560(21.8) Compiled Laws 48 24.108 "Any person aggrieved by a final decision in a contested case, where such decision is affirmative or negative in form, is entitled to judicial review thereof under this act; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief or trial de novo, provided by law."

It is petitioner's contention and found by the trial court that the provisions of the Michigan Administrative Code and Michigan Administrative Procedures Act required "due process" hearing before the City Commission as a subordinate liquor licensing authority. The Court of Appeals in this case ignored the fact that the statute providing for due process hearing in revocation cases was not put into the statute (M.S.A. 18.988) until 1960 as the result of the attempt by the defendants in this case to revoke eleven (11) bar licenses without any hearing or without any reasons. The 1960 amendment (Act. 151, P.A. 1960) to this statute added nothing that *Glicker v. Liquor Control Commission, supra,* had not already added at least by requiring some form of hearing which was reviewable by the court so as to prevent denial of equal protection of the law. The inevitable result of Glicker was to remand the case to the District Court for a determination as to whether or not the appellant had been denied equal protection of the law and this determination could only be made upon a *record* made by the District Court. It is therefore submitted that the Court of Appeals erred in ignoring the fact that due process procedures were required by state law and thereby petitioner was denied equal protection of the law in the application of the state law to him by not requiring a hearing on his application for transfer.

III. The Due Process Clause of the Fourteenth Amendment does apply to liquor licensing as squarely determined by *Hornsby v. Allen*, 326 F. 2d 605 (1964) in the Fifth Circuit and *Minkhoff v. Payne*, 210 F. 2d 689 (1953) and squarely rejected by the 6th Circuit Court of Appeals in this case.

It is petitioner's contention that the decision of the Court of Appeals in this case is also in direct conflict with the Court of Appeals for the District of Columbia in the case of *Minkhoff v. Payne*, 210 F. 2d 689 (1953) and *Hornsby v. Allen*, 326 F. 2d 605 (1964). See 356 F. 2d 249, 289. In *Hornsby v. Allen* there was an action by an applicant for a liquor license whose application was denied "without a reason therefor" and the denial was charged to be "arbitrary, unreasonable, unjust, capricious and discriminatory" and in contravention of due process and equal protection clauses of the 14th Amendment. The court said at page 608: "At the outset we note our disagreement with the District Court's classification of the challenged actions as purely those of a legislative body; we do not concede the denial of an application for a license to be an act of legislation . . . we prefer the view that licensing proper is an adjudicative process, thus when a municipal or other governmental body grants a license it is an adjudication that the applicant has satisfactorily complied with prescribed standards for the award of that license. Similarly the denial of a license is based on an adjudication that the applicant has not satisfied those qualifiations and requirements . . . A governmental agency entrusted with the licensing power therefore functions as a legislature when it prescribes these standards, but the same agency acts as a judicial body when it makes a determination that a specific application has or has not satisfied them."

"Since licensing consists in the determination of factual issues and application of legal criteria to them — a judicial act — the fundamental requirement of due process are applicable to it."

IV. The decision of the Court of Appeals in this case conflicts with the United States Supreme Court's decisions in *Schware v. Board of Bar Examiners*, 353 U.S. 232, 1 L. Ed. 2d 796 (1957); *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926); *Greene v. McElroy*, 360 U.S. 474, 3 L. Ed. 2d 1377 (1959); *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1962).

The decision of the Court of Appeals in this cause is in conflict with the principles set down in various United States Supreme Court decisions that the actions of administrative licensing boards are subject to the due process clause of the 14th Amendment to the Constitution. It is the contention of the petitioner that the activities of the defendants and the method of disapproval of the transfer in this case was a denial of due process. It is petitioner's further contention that the action of defendants is in conflict with the decisions of the United States Supreme Court in,

Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926);
Willner v. Committee on Character and Fitness, 373 U.S. 96, 10 L. Ed. 2d 224 (1962);
Greene v. McElroy, 360 U.S. 474, 3 L. Ed. 2d 1377 (1959);
Schware v. Board of Bar Examiners, 353 U.S. 232, L. Ed. 2d 796 (1957).

It is appellant's contention that the Court of Appeals has unduly restricted the application of the Supreme Court decisions in the aforementioned cases and is seemingly afraid to apply constitutional principles to this case because of the nature of the liquor business when it is too late in the day to claim the liquor business is any more detrimental to society than the automobile, drug or cosmetic business. The court is perfectly willing to allow constitutional rights to be distinguished on the shallow ground of privilege or the nature of the business involved. We cannot but urge that this is too shifty a basis upon which to base constitutional rights.

The court further held that the decision of the deciding authority must be based on evidence adduced at a hearing. To like effect is the decision of the Court of Appeals of the District of Columbia in *Minkhoff v. Payne* (*supra*), where the court said "refusal to renew a license previously issued must be based upon evidence which applicant had full opportunity to refute". In this case the hearing was determined to be under a procedure applicable to an *application* for a license and the court held this was proper.

The Court of Appeals in this case said at 356 F. 2d 276, 289 "We recognize some observations in the *Hornsby* case as being at odds with our conclusion and to that extent we decline to follow it". The Court of Appeals in this case does not recognize that the *Hornsby* case came to the Fifth Circuit Court of Appeals without any statutory requirement for any hearing as was the case when the *Glicker* case reached the Court of Appeals for the Sixth Circuit. The court in this case is willing to find that "plaintiff Lewis was, under *Glicker* and other authorities, entitled to "equal protection of the law" guaranteed by the 14th Amendment but it is not willing to extend this doctrine to due process or fair hearing in the determination as to whether or not he has been given equal protection of the law in the circumstances of this case. 356 F. 2d 276, 296.

V. Petitioner was denied equal protection of the law by use of unrecorded reasons in the separate record "identified as the causes" for disapproval of the transfer of the liquor license to him by the defendants.

All of the reasons stated by the defendants for the disapproval of the transfer, in the separate record, were arbitrary, capricious and unreasonable. It is also petitioner's claim that the reasons given in said separate record were invidiously and racially discriminatory. The reasons given in the separate record for non-transfer of the license will be discussed in two parts:

1. Those reasons that were discussed during the transfer hearing;

2. Those reasons which were not discussed,

The only reason both given in the separate record by defendants as a cause for non-transfer of the license and discussed during the tranfer hearings was taxes owed by the licensee. The record shows very clearly and without dispute that other licenses had been transferred and had never been held up because the licensee owed taxes (222b, 401b). Th so-called "discussion" of the taxes owed by the licensee in this case was a matter of explaining the mechanical processes by which businesses are transferred under the Bulk Sales Law and escrow arrangements whereby taxes as well as other obligations are paid upon the transfer of the business including the license (400b). In this case the defendants, against all evidence in the record, tried to make it appear that plaintiff and petitioner was somehow *responsible* for the failure of the licensee to pay certain taxes. They also used the owing of taxes as an indication that the licensee was not making money, in spite of the fact that they were aware that substantial amounts were owed for income taxes. It goes without arguing that a person does not owe income taxes unless he earns a net profit in a business. In the case at bar the evidence shows that the financial arrangements including the payment of taxes had been examined, investigated and approved by the Liquor Control Commission which had the usual responsibility in this area. The record further shows that income tax information on the licensee was part of the Liquor Control Commission files submitted by the licensee. None of the financial and tax arrangements was prior to this time, the official business of defendants except the personal property taxes.

The fact that this had never been used as a criteria by defendants is shown by the following statement in the pre-trial conference (28b):

> "THE COURT: Well, do you request financial records of other applicants?
>
> "MR. GARLINGTON (City Attorney): The Liquor Control Commission does and if they are satisfied, then we usually are.
>
> "THE COURT: Has the City of Grand Rapids ever requested that?
>
> "MR. GARLINGTON: I can't answer that, Judge."

It is submitted that a lawyer's discussion of taxes owed by another does not give notice or intimate that defendants will later claim that the fact that such taxes owed by another whom the lawyer applicant has represented is grounds for disapproval of said applicant for a transfer of the license. If this be so, no license would ever be transferred and it would not be necessary for the usual bulk sale laws which require notice to all creditors of the sale en toto of any business establishment of the assets thereof. It is also to misunderstand the nature of a so-called "stop" request wherein the Liquor Control Commission is requested to see that the escrow arrangement provides for the payment of the money "after" the approval of the transfer and during the actual execution of the transfer documents (356b). We submit that the Court of Appeals erred in holding that "discussion" of taxes owed by another is a sufficient ground for denial of the transfer of the license to petitioner.

It is submitted that of all the other reasons given in the separate record as grounds for the non-transfer of this license, none was discussed during the transfer hearing and therefore they were arbitrary, capricious, unreasonable and discriminatory (243b).

The dismissed "gambling charges" were never mentioned at the transfer hearings and at the revocation hearings were dismissed by the City Attorney, to-wit, October 16, 1962 (222 F. 2d 349, 367), (56b). The other reasons advanced by defendants at the trial were attempts to make assumptions about the factual basis of petitioner's relations with his former client without any evidence and indeed contrary to evidence in the record. Certainly a "history of gambling" cannot be equated to a "sale" of a number by someone who leaves the bar and comes back with a crumpled piece of paper and hands it to another person who immediately puts said piece of paper in his pocket. The record also shows that the only plea of guilty involved pieces of paper which were thrown in the street by a man who was arrested by police officers on a warrant outside of the building in which the bar is located (351b). These pieces of paper were not observed at all times by the officer in the car with him (352b). Certainly the fact

that a part owner of a building standing outside of his building has some pieces of paper or any other possible contraband in his pocket cannot be used to taint either the tenant of said bar or the attorney who represents said tenant with some type of guilt related to gambling. The possession of gambling paraphernalia cannot by any stretch of the imagination be termed gambling. It is submitted that one who is in possession of a pair of dice might be in possession of gambling paraphernalia but certainly cannot be charged with gambling if he does nothing but have the dice in his pocket.

Another reason for disapproval given on the separate record was the bar was a "poor operation" under petitioner's management. In this connection petitioner calls the Court's attention to Exhibit 5, which shows that during petitioner's management the licensee took in $107,800.25 (246a). The City Attorney asked the court to require petitioner to produce financial statements given to the Liquor Control Commission (27b). This statement shows that this information was never within the hands of the City Commission or its agents prior to the trial and all the ctiy commissioners admit that they have never seen a profit and loss statement relating to said bar (235b, 236b). Defendants did not see the letter written by the licensee on October 21, 1961 until the trial when same was part of the Liquor Control Commission files (259a). Said letter indicated that the management fee of petitioner amounted to $8,406.78, and this was based on fees of 6% and 10% per year. A projection of these percentages would indicate to the trier of the facts that the minimum income on which these fees would be based would be $84,067.80 to a maximum of $140,113.00. Commissioner Lamberts (141b) and Commissioner Jamo admitted that they knew income taxes were owed and that the bar made money (235b). Commissioner Barto also testified that he was aware that Mrs. Ettress owed federal income taxes (222b) and at no time did anyone state that Mrs. Ettress, the licensee, did not make any money in the operation of this bar (223b). Commissioner Barto, chairman of the Safety Committee, also testified that petitioner told the committee that he did not handle the collection of the cash and that "quite a

sum of money" had been taken in by this bar and that petitioner had "showed some figure" (223b).

In regard to the claimed reason that petitioner knew of his "relation with his client", (p. 103c, C.C.A. Opinion) it is sufficient to say that at no time was there any evidence in the record that his former client or any of the lawyers that represented her made any claim against petitioner or that the licensee made any claim against petitioner that had any basis in fact or reason. It is submitted that the trial court found that the relation between petitioner and the licensee was not the affair of defendants and ruled that neither party could go into relations between the licensee and petitioner during the trial of the cause (267b). The record is abundantly clear that Mrs. Ettress sold the bar in August of 1960 and that sale thereof was pending until the trial of the within cause. The question is posed as to whether petitioner could have "announced or considered that the title he then acquired was to protect or as trustee for his client." (I.R.S. Sale), (92c).

It is submitted that the so-called and alleged transfer hearing of January 16, 1962 through July 24, 1962 were at the request of petitioner and in the nature of a complaint against the Chief of Police. The fact that these were not hearings on the transfer is well shown by the statement of the Chief of Police that petitioner contended at the committee meeting of July 24, 1962 that the letter from the Liquor Control Commission dated April 6, 1962 was not brought to the attention of the Safety Committee. His answer to the question as to why the committee was addressing itself to questions about status of the license and the operation of the bar after April 2, 1962 is illuminating (314b):

> "A. It is my understanding that the writing to the Liquor Control Commission by the Grand Rapids City Commission, was occasioned not so much because of the letter of April 6, but the renewal of May 8th and the circumstances and details under which this renewal was consummated."

This is a clear indication that the Chief of Police, after the license renewal on May 1, 1962, was keeping the commissioners concerned with the fact that petitioner was then in complete control of the bar pending transfer, where as in the reasons given in the separate record for failure to approve petitioner, the licensee was shown by the record to be in charge of the bar (30b) prior to sale to petitioner.

The statement in the separate record that no lawyer should be a licensee (331b) is patently arbitrary, capricious and discriminatory on its face and petitioner claims that it is also racially discriminatory as petitioner claims as of the two Negro lawyer applications, Ralph Rodgers (390b, 391b) and petitioner, both were denied approval, whereas defendants admit that white lawyers have been approved as licensees in the City of Grand Rapids and held licenses at the time of the trial (320b).

It is submitted that other things done by the defendants show that the reasons given in the separate record are arbitrary, capricious, unreasonable and invidiously discriminatory. It is submitted that all of the alleged reasons in the separate record were known prior to July 24, 1962 at the meeting which Dr. English and petitioner attended. It is submitted that if those reasons were valid on July 31, 1962, they were also valid on November 1, 1961, and all as a matter of fact were matters of newspaper publicity and could not have been of any embarrassment to petitioner because at no time during this period did defendants claim or try to claim that petitioner was in any way responsible for the alleged gambling charges which were dismissed (7c) or the failure of the licensee to pay certain taxes.

It is further submitted that the defendants did a large number of unusual and unnecessary things if their reasons were valid. The following are only a few of the examples in the record:

(a) Delays in the processing of the charges in the courts;

(b) Refusing to submit the form 1800 to the City Clerk or the Liquor Control Commission which the Chief of Police was required to do by a standing rule of the City Commission (Ex. 68).

(c) The Chief of Police tried to get the Internal Revenue Agent and the City Treasurer to act against the bar;

(d) The defendant Chief requested a new investigation by the Liquor Control Commission (128b);

(e) The evidence at the trial showed that the police department and the liquor control investigator called in by defendant Johnson submitted false reports to the Liquor Control Commission (Ex. 8L);

(f) The Chief of Police did not advise petitioner or the Safety Committee or the City Commission about the letter he received from the Liquor Control Commission dated April 6, 1962, as shown by the City Clerk's minutes of the meeting of the Safety Committee on April 17, 1962 (Ex. 68);

(g) The Safety Committee was suddenly in a hurry to act on July 31, 1962;

(h) The Safety Committee required the City Attorney to make complaints against petitioner to the Liquor Control Committee;

(i) The defendant Chief of Police and the liquor investigator stayed in contact with each other although the investigations were supposed to be separate and independent of each other;

(j) The revocation hearings were brought by the Safety Committee, particularly Commissioner Lamberts when she could not get the Liquor Control Commission to act against petitioner;

(k) Commissioner Lamberts made complaints to the Attorney General and to the Governor's Legal Adviser;

(l) The Commission claimed that the operation was "poor" where there was on evidence that petitioner was in control but when petitioner did take control of the bar during the hearings and pending the transfer, they then contended that the operation was illegal (408b);

(m) No explanation was ever given for the withholding of the Form 1800 sent to the Police Department on October 13, 1961 and approved by the sergeant of the Vice Squad on November 1, 1961, who was directed by the defendant Chief of Police to change the approval to a disapproval after July 31, 1962;

(n) Commissioner Jamo stated that when he voted for the denial resolution on July 31, 1962, there were no reasons stated (243b).

Petitioner submits that the reasons for denial were arbitrary, capricious, unsupported and unreasonable and therefore violates petitioner's constitutional rights.

VI. The rights of petitioner, a Negro attorney, under the 14th Amendment, were violated by defendants' claim that no attorney should be a liquor licensee because the record shows that all Negro attorney applicants were disapproved and white attorney applicants were approved. The only two denials of non-Negro applicants have been one for making a critical statement about the police, and the other "for political reasons".

Exhibit 68 (390b) shows that Mr. Ralph Rodgers (a Negro lawyer) was heard and Mr. Frederick W. Poel, another lawyer, spoke "on behalf of Mr. Rodgers and himself" and one of the reasons stated "(d) Chief of Police prejudice". At this hearing on December 19, 1961 "Commissioner Lamberts moved that the request be denied." At page 311b defendant Johnson testified "I can't see where any attorney could possibly accept these plural responsibilities, I think it is definitely incompatible, and I couldn't see where Mr. Lewis, or any other lawyer could fulfill the obligations of both roles." At page 331b the following question of Mr. Lewis was asked of defendant Johnson — "It is your contention no lawyer can or should be a licensee under the Liquor Control regulations?" Answer: "That is my contention, Mr. Lewis."

VII. The Court of Appeals erred in reversing the findings of the District Court on the facts developed in a six weeks trial and patently erred in its determination that petitioner was not denied due process or equal protection of the law by racial and invidious discrimination and arbitarary, capricious and unreasonable denial of the transfer of said liquor license.

At the argument of the within case in February of 1965 counsel for defendant city admitted that under the present status of the law and particularly under the federal cases applicable to the case at bar that the petitioner had not received a fair hearing before the City Commission on the transfer. As stated by the Court of Appeals the city *did not deny* that the so-called second series of hearings referred to in the record as revocation hearings denied pettioner equal protection of the law. (Emphasis supplied). At that time counsel for defendants argued that the case should be returned to defendants for the purpose of having a full scale hearing (and denying said transfer in due course) and indicated to the court that four of the commissioners who were on the commission at the time of the hearings were no longer on the city commission. It is submitted that those parts of the record quoted by the Court of Appeals which show that petitioner was not denied equal protection of the law are such statements or findings of fact that were not necessary or material to the findings of the District Court. Many of the interpretations made by the Court of Appeals and findings made by the District Judge are solely matters of interpretations of the wordings and the import of the meaning of the words as used in the context of the trial. The most notable example is shown on page (116c).

"(4) 'When commissioner Sevensma on cross-examination was informed *of the facts* in the alleged gambling cases he statec that if he had known these facts his judgment about the case *would* have been different' (222 F. Supp. 373). Commissioner Sevensma did not so testify. Mr. Lewis' questions contained Lewis' hypothesis of facts which he contended would have failed to establish that there was gambling in Barnett's Bar. Asked if he knew

such to be facts, would his judgment have been different, Sevensma answered 'I would say yes, *perhaps* it would have been different . . . it *might* have been different' ".

On (page 119c) of the Court of Appeals opinion the Court of Appeals held "Lewis does not deny the factual high points of his management of Barnett's Bar and his client's affairs" and it is submitted that there is no evidence in the record about petitioner's management of the bar or his relations or responsibilities to the bar or to his client and indeed same were ruled out by the court. On page 113c of the Court of Appeals opinion the Court of Appeals extracts a police report which was submitted to the Liquor Control Commission entitled "items confiscated from 58-60 Ionia during the numbers raid of 8-5-60". The Court omits to say that none of this alleged evidence was ever submitted to any court and none of the cases arising out of said alleged arrests for conspiracy were ever prosecuted. It is submitted that it is a highly irregular procedure for a Court of Appeals to take as true conclusions and statements made by police officers which have never been submitted to a court and never used against a person arrested as a result thereof and tried to use them to prejudice the lawyer who successfully represented the defendants accused in such charges.

Without belaboring or discussing the entire record it is submitted that a comparison of the findings of the District Court and the findings of the Court of Appeals against the background of the record in this case will show that the Court of Appeals has solely come to different conclusions based on the same facts which the trial judge had ample opportunity to observe and evaluate. It is further submitted that the Court of Appeals under Rule 52 of the Federal Rules of Civil Procedure and *United States vs. U. S. Gypsum,* 333 U.S. 364, 365, 92 L. Ed. 746 (1948 was not authorized to find that upon the whole record the finding of the trial judge were "thoroughly erroneous". Petitioner therefore urges the court to look to the facade of defendants who claim not to be racially prejudiced to determine the effect of their past actions and their actions against petitioner herein which clearly show that they were not only racially prejudiced but invidiously

discriminatory in the matter at bar and exercised the so-called discretion vested in them in an arbitrary, capricious and unreasonable manner.

Petitioner further urges that the Court of Appeals erred in failing to grant rehearing upon the following petition filed by petitioner:

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT:

Alphonse Lewis, Jr., the Plaintiff-Appellee, above named, presents his petition for rehearing in the above matter and in support thereof, respectfully shows:

I.

The Court, in its opinion of reversal, has clearly erred in ruling that plaintiff was not entitled to *due process* in connection with his application for transfer; in this regard the Court unduly limited the application of such cases as *Willner vs. Commissioners,* 373 U.S. 96 10 L. Ed. (d) 224 and *Hornsby vs. Allen, et al.,* 326 Fd. 2d 605 (1964), and failed to consider the grave implications of such a ruling in regard to such applications.

II.

The Court, in its opinion of reversal, has clearly erred in ruling that the District Court's findings as to racial bias and discriminatory motive on the part of the defendants were clearly erroneous, in the following respects:

(a) The Court failed to give due and sufficient consideration to the traditional role of the Trial Judge, as trier of the facts, and his duty and right to observe the witnesses in their testimony and actions, and from his observations, to draw his conclusions as to the respective credibility of each and every witness;

(b) The Court failed to give due and sufficient consideration to the reasonable inferences drawn by the Trial Judge, particularly in a case such as this, where direct evidence of discrimination is not generally available;

(c) The Court could not, I respectfully submit, in all fairness upon this record, be left with "the definite and firm conviction that a mistake has been committed" by the trial judge, in a case of this nature because the findings to be made by either the trial court or the appellate court must necessarily be based in large part on inferences, appearances, credibility and like considerations in their inter-relationship with the facts;

(d) The Court erred in its reliance on *U. S. vs. U. S. Gypsum*, 333 U.S. 364 in that said case involved an appeal from an order granting defendant's motion to dismiss at the close of the Government's proof, and that substantially different considerations are involved in regard to the sufficiency of evidence at such a point in the trial.

III.

The Court, in its opinion of reversal herein has erred in basing its conclusions on facts erroneously stated in the following respects:

(a) The Court relied on the fact that plaintiff had financial control of the licensee's business or funds and specific responsibility to pay taxes, which was not based on credible evidence and the licensee testified contra (see pages 157--158b of appellee's appendix);

(b) The Court states that the City Commission was agreeable to a transfer to plaintiff's partner, Dr. English, whereas in fact, in Dr. English's own words about the meeting of July 24, 1962 "There was quite a bit of discussion at that meeting, and it seems to me that I was being treated more as a criminal rather than a citizen asking for the transfer of a license. The tacties of the Safety Commission didn't seen very cordial to me" (see page 346b of appellee's appendix):

QUESTION: "Were any reasons ever given in your presence for denial of the transfer in one of the Safety Committee meetings?"

ANSWER: "No."

(See page 347b of appellee's appendix).

(c) In footnote 5, page 20, of the Court's advance opinion, the court quotes testimony of Commissioner Jamo as a member of the "Safety Committee" when in fact he was not a member of the "Safety Committee" during the hearings on the application for transfer (see Exhibits 68 and 69);

(d) The Court relied on defendant's testimony that the so-called transfer hearings related to discussions of the application for transfer when the evidence shows that they were a discussion of "the renewal of May 8th and the circumstances and details under which this renewal was consummated (see page 314b of appellee's appendix and Exhibit 9).

IV.

The Court in its opinion of reversal herein, has clearly erred in that it failed to give due consideration to the following material evidence before the trial judge:

(a) The tape recording of the City Commission meetings, particularly on July 31, 1962 (Exhibit 52);

(b) The new and unique tests of competency applied to this particular plaintiff on his transfer application;

(c) That the Sergeant who was in charge of the raid on the building and bar and who testified before the Liquor Control Commission about said raid and who was in charge of investigating transfer applications, approved of the transfer to plaintiff and Dr. English;

(d) That the Chief of Police and certain commissioners promoted and engaged in studied delays of the matter;

(e) That the defendants based their reasoning upon hearsay and false information as well as improper criteria;

(f) That all the regulating agencies and officers thereof approved of plaintiff as a transferee;

(g) That the Michigan Administrative Code required a fair hearing on plaintiff's application for transfer (see page 15 of appellee's brief);

(h) That defendants had previously tried to close bars without any hearings (see page 71b of appellee's appendix).

(i) That plaintiff had to call defendant commissioners to testify over defense counsel's objections;

(j) That the defendant Chief of Police was prejudiced against lawyers and stated "no lawyer can or should be licensee" (see pages 311b and 331b of appellee's appendix);

(k) That Safety Commission chairman Barto stated at a revocation hearing that no reasons had ever been given to him or the Committee. (see page 161b of appellee's appendix).

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the District Court be, upon further consideration, affirmed.

Alphonse Lewis Jr.
Attorney for Petitioner
and Plaintiff-Appellee

(Denied April 7, 1966).

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for Writ of Certionari should be granted.

Alphonse Lewis, Jr.,
Attorney for Petitioner.

Exhibit 1 — Safety Committee Hearing, Nov. 7, 1962
Testimony of Arthur J. Arens

APPENDIX A

EXHIBIT 1 — Hearing before the Safety Committee of the City of Grand Rapids, November 7, 1962

• • •

(5)

ARTHUR J. ARENS, called as a witness herein, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
By Mr. Miller:

• • •

(33)

MR. LEWIS: Let me say this, Mr. De Boer will recall, and I think I have already introduced here a receipt in which the personal property taxes were paid for the year 1958. As I have heretofore told you, I did not have control of the money for the payment of these taxes. I did on numerous occasions try to get Mrs. Ettress to take care

(34)

of these taxes. Mr. De Boer will tell you that on numerous occasions I have been in contact with him personally. I have a letter signed by Mr. De Boer, dated March 22, 1962 in which he gave me for my use the amount of taxes to be paid at the time we filed this agreement with the City Commission and at the first hearing at which Mr. DeBoer attended, I think it was in April, Mr. DeBoer, I think, informed or least I informed the committee that, at that time we had made arrangements by a conference with Mr. DeBoer to put the tax money in escrow. I think I stated that to this committee very fully, that the proper way to handle a transfer of a liquor license or any business under the Bulk Sales Law is to put the money in escrow and Mr. DeBoer and I had an understanding that the money would be put into escrow pending the transfer. Now, Mr. DeBoer wanted it a little different, as I recall, he wanted the check

in his hands, making himself an escrow agent for the payment of the personal property taxes where the usual situation is the escrow agent holds all funds and then the escrow agent pays out all funds. When Mr. Sevensma was on the committee, that was discussed and at that time Mr. Johnson did not think that an attorney could be an escrow agent and was advised by Mr. Sevensma that Mr. Dewey in this situation, could both act as attorney for Mrs. Ettress and as escrow agent.

* * *

(35)

MR. LEWIS: Well, Mrs. Lamberts, you use the term "transfer" interchangeably as it suits yourself, however, so far as the taxes were concerned, the taxes are to be paid from the proceeds of a sale by the statute. In other words, by both the Liquor control Statute, the Bulk Sales Law and the Sales Tax Law, there is provisions for these escrow arrangements, they have to be made. In fact, there is a ten day provision, as I recall, in one of them where the funds are not payable out of the escrow —

MR. VANDEN BERG: I want to ask you, Mr. Lewis, the question I asked you before. You don't mean to imply that by just suggesting that there is going to be a sale, that you thereby can avoid paying taxes?

MR. LEWIS: No, I don't.

MR. VANDEN BERG: Because this seems to be the final result of this, if you say there is going to be a sale and this is pending, we could have this pending until eternity.

MR. LEWIS: You are right, Mr. Vanden Berg, except this, under the laws that I have referred to, and no business man would pay taxes or pay money when he is in the

(36)

position of purchasing the business until the statutory requirements have been met. Now, one of those statutory requirements under the Sales Tax Law, for instance, is that the escrow agent hold sufficient funds to pay the sales tax until the sales tax clearance is issued.

Exhibit 1 — Safety Committee Hearing, Nov. 7, 1962
Testimony of Arthur J. Arens

MR. VANDEN BERG: Well, Mr. Chairman, I just want to make an emphatic point. So far as the City is concerned, it can at any time go in and collect those taxes.

MR. LEWIS: I don't think there is any question about that, Mr. Vanden Berg. I am only talking about the matter from a practical aspect.

THE CHAIRMAN: I think we have had others, in fact quite often there are transfers, that a request for a transfer is made where there are taxes due, but before the final approval is made, those taxes are all taken care of, so that was the case here, but as of now there is no transfer pending.

MR. LEWIS: Mr. Barto, may I say to Mr. Vanden Berg, secondly, in this particular case when we, when I got the license from Mrs. Ettress in the beginning, we had to pay Mr. Baldwin's taxes, those taxes which Mr. DeBoer just mentioned, we had to pay those taxes. I have the receipt in my file for the payment of those taxes.

(37)

MRS. LAMBERTS: What taxes?

MR. LEWIS: The personal property taxes.

• • •

(38)

THE CHAIRMAN: Jim, can I interrupt you. You said this first question was settled. If there is a profit being made now, why isn't some of that profit being used to pay part of the personal property taxes?

MR. LEWIS: Well, if you want to see the books and records as to whether or not there is a profit, then that is one question, and if you want the taxes paid, that is still another question, because taxes are paid whether or not there is a profit. There isn't any question that I could pay the taxes by taking the money out of my pocket, but in getting this thing, I am trying to get it and keep it on its feet and there has not been enough profit to pay the total amount of these taxes. As I recall it, my recollection is that there is approximately Seven Hundred Dollars —

Exhibit 1 — Safety Committee Hearing, Nov. 7, 1962
Testimony of Arthur J. Arens

MR. MILLER: My understanding is that they amount to $775.44 plus penalties and interest.

MR. LEWIS: Right.

MR. MILLER: Now, secondly, isn't it your position in opposing this November 1 Order of the Referee in Bankruptcy that he is wrong in determining that the trustee is the owner of this license, and don't you maintain that you, yourself, have this license?

MR. LEWIS: No, and I stated that right here in the previous meeting. I don't contend that the license is in

(39)

my name. I contend I have an interest in this license. I contend I have an interest in this business, that the only way this business can operate is with the license. Now, I have got a lot of money involved in this which somebody seems to want to ignore and I have pointed out to this committee before that due to the fact that the money was not being properly managed, certain official agencies required and consented to my taking over financial control.

MR. VANDEN BERG: Did you do this without a tranfer of this license from the City of Grand Rapids or the Liquor Control Commission?

A. Well, I did this in August, 1961.

MR. VANDEN BERG: At that time, had the license been transferred to you?

A. No, it wasn't. Even at that time, the transfer was being held up by the Grand Rapids Police Department, because of a citation against Mrs. Ettress.

* * *

MR. VANDEN BERG: Then, Mr. Chairman, another question particularly now to Mr. Miller, and Mr. Lewis can answer it if he wants to, is it not true that what you

(40)

do as an individual with your money in the way of lending, giving or making it available is strictly your business?

MR. LEWIS: No, not in the case of a liquor establish-

ment. It has to be passed upon and approved by the Liquor Control Commission.

MR. VANDEN BERG: And your investment in this license has not been approved?

MR. LEWIS: It has been approved.

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CROSS EXAMINATION
By Mr. Lewis:

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(43)

Q. Now, isn't it true that prior to June 19, 1962 then, that all of the papers and all of the books and records had been examined which had been referred to you as requested after May, 1962?

A. In regard to this transfer?

Q. Yes.

A. Yes.

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(44)

Q. Now, isn't it true also that sitting in my office before you was a box in which were contained records and papers relating to Barnett's Bar?

(45)

A. You indicated there was a box of papers and records of the Barnett's Bar, you indicated that.

Q. And you knew that from the time you talked to me the first time, isn't that true?

A. You indicated there was a box there.

Q. Now, isn't it also true that you told me that you wanted to talk to Mrs. Ettress in the City of Grand Rapids before your doing anything further in this investigation?

A. In every investigation, Sir, we talk to — in this case, it would be to applicants, you and Dr. English, I asked you a number of times where Dr. English could be contacted, one time you told me he was in Idlewild, another

time he was unavailable; I would have to talk to Dr. English, Mr. Lewis and Mrs. Ettress.

• • •

Q. Isn't it true then that you asked me to make some effort to have Mrs. Ettress to come to the City of Grand Rapids to talk to you?

A. That is right, sir.

(46)

Q. Isn't it true I told you I wrote her a letter to advise me when she could come here to talk to you?

A. You stated to me you had, yes, sir.

Q. Isn't it also true that for one of the periods of time involved you told me you were going away yourself for a period of time and that you would contact me after you returned from school or some other business trip that you were making?

A. That is right, sir. • • •

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A. I asked if you wanted it held up and you stated you wanted this investigation held up. I said, in that regard, fine, would you give me a letter stating that you, as an applicant wished to have this investigation held up.

Q. (Indicating): Is this a copy of the letter?

A. I would have to check my personal file, but it appears that it may be, yes.

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(47)

Q. Now, isn't it true that the reason that the investigation, in your opinion, could not be completed, was because you did not make arrangements to meet Mrs. Ettress?

A. Sir, as all investigations go, and this is no exception, we have to begin at the beginning of all investigations, and go through the points as outlined previously in this hearing right here today.

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Exhibit 1 — Safety Committee Hearing, Nov. 7, 1962
Testimony of Arthur J. Arens

(50)

A. * * * I will show you the letter that the Liquor Control Commission did deny your request and I will tell you approximately the time it was denied, December 13, 1961, I believe it was denied. No, August 7, 1961, denied by commission due to failure to receive favorable recommendation from the police department.

Q. Mr. Arens, I am talking about the period, and I want to limit it from October 31, 1962 to January 31 — January 30, 1962, did you talk with anyone at the police department during that period in connection with this case?

MRS. LAMBERTS: There isn't anything wrong with his doing that, is there?

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(51)

Q. Mr. Arens, would you listen to my question, please, and try to answer the question, if you can, because we can get along better. Isn't it true —

MR. VANDEN BERG (Interposing): Well, Mr. Chairman, I think we want to adhere to due process, but I think Mr. Lewis, that we are going to have to sometime say that we are going to terminate the hearing on such and such a time and I certainly think we have got to recess or adjourn at this time until a further date. We have gone a half hour beyond, it's almost eleven thirty-five.

MRS. LAMBERTS: Can we close the hearing and discuss it?

THE CHAIRMAN: Mr. Lewis said he would like to call some witnesses. In view of this ten day stay, I would still like to meet wtih the committee today, but at the same time would it still be in order and agreeable with the rest of the committee we adjourn until next Tuesday?

MRS. LAMBERTS: I would like some indication that we are going to take some distinctive action on some definite date.

THE CHAIRMAN: Of course, at the same time, if you agree to give the persons involved or interested, a

(52)

fair hearing, you might get sick of listening to it, but you still have to listen to it.

MRS. LAMBERTS: Let's get an indication as to whether it is pertinent.

THE CHAIRMAN: I don't want somebody coming back and saying later on they were deprived of a fair hearing.

MRS. LAMBERTS: No, Mr. Chairman, I think we should determine whether, whatever else is going to be brought before this committee is pertinent to the question that we have before us and not irrelevant matters that would fill a book.

THE CHAIRMAN: Would it be agreeable with the committee that we adjourn it for two weeks and at that time if you have any witnesses, Mr. Lewis —

MRS. LAMBERTS: Why two weeks?

THE CHAIRMAN: Would one week be enough in view of this stay?

MR. MILLER: Well, the stay would be effective until Tuesday, the 13th, would it not, because of the holiday on the 12th?

MRS. LAMBERTS: Mr. Chairman.

THE CHAIRMAN: Mrs. Lamberts.

MRS. LAMBERTS: Mr. Chairman, the first session of this hearing we requested Mr. Nichols and Mr. Lewis, too, and Mr. Miller to get together and see if they could

(53)

come to a voluntary agreement to place this license in escrow by a certain time. Mr. Miller, has that attempt been made?

MR. MILLER: Yes, Ma'am.

MRS. LAMBERTS: And it has been unsuccessful?

MR. MILLER: That's right.

MRS. LAMBERTS: Mr. Lewis has not voluntarily agreed to place this license in escrow?

MR. MILLER: None of the parties who claim an interest in this license have seen fit to get together to place this

license in escrow and I am speaking of Mrs. Bell's attorney before the bankruptcy petition was filed; I am speaking of Mr. Lewis, who is here before us today, and I am speaking of Mr. DeGroot and Mr. Nichols; no one who has control of this license has placed it in escrow.

THE CHAIRMAN: It gets down to the point Mr. Nichols has been appointed trustee, right, so, actually as we are concerned, the license for all practical purposes until it is finally settled, is in his care?

MRS. LAMBERTS: However, there is nothing to keep these parties from voluntarily agreeing, which they have not done which we specifically asked them to do, and it is my position that this whole thing in the courts and

(54)

everywhere would be speeded up considerably if that door were closed and the license placed in escrow so that it was in the best interest of both Mr. Lewis and the Trustee to make a settlement so that the bar could be opened again, this is my point.

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MR. MILLER: I think there is no doubt that the Court has restrained or stayed the order determining the Trustee is the owner of the license

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THE CHAIRMAN: On the 24th, as I remember, of

(55)

October or the 16th of October. In other words, Mr. Nichols is waiting for a decision from the Court, the Bankruptcy Court, and he will immediately apply to place it in escrow, is that right?

MR. DE GROOT: That is the Trustee's position, yes, sir.

MRS. LAMBERTS: But Mr. Nichols would at this time, —

THE CHAIRMAN: He said he can't.

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MRS. LAMBERTS: Mr. Lewis, are you willing at this time to voluntarily agree to place this license in escrow until this legal question is solved?

MR. LEWIS: All right, Mrs. Lamberts, I am not going to answer that question. You have given me several ultimatums. You have threatened me with investigation, and I want it made as a matter of record that this whole hearing, as far as you were concerned, you told me in Mr. Miller's presence, your objection to this bar operating or you had objection was my operating it.

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MRS. LAMBERTS: Because of the illegality of this operation.

MR. LEWIS: This operation is not illegal. It is with the complete knowledge of the Liquor Control Commission. Mr. Arens knows it, you know it.

• • •

MR. MILLER: Mr. Chairman, I would like to have it pointed out that it is extremely difficult for us to obtain court reporters for hearings at times certain and I would like to have the committee suggest that if anyone wishes a court reporter, that they obtain the reporter for the adjourned date, but that we would not supply the reporter or guarantee a reporter for that date.

MR. LEWIS: How can you have a fair hearing? This is the thing I am worried about. On many occasions, statements were made, then they are later disputed and the reason I have repeatedly and from the beginning asked for a reporter so there is no question about what was said.

(57)

MR. MILLER: The first request I had was the letter and you can bring your recorder or reporter next week.

THE CHAIRMAN: Jim, I think in all fairness, since we are conducting the hearing, I think we should provide a court reporter.

MR. VANDEN BERG: We won't terminate the hearing the week after.

MR. LEWIS: Mr. Vanden Berg, that is the thing that bothers me. Naturally, in these hearings, everybody wants to save time if they can and a lot of issues have been raised and as Mrs. Lamberts raised a moment ago the question of relevancy comes up in every hearing and in this particular hearing, Mrs. Lamberts has even questioned why I don't bill clients monthly. If we are going all over the lot in the, when the City's case is being presented, I think I should have the right to present testimony in connection with anything that has been presented at this hearing.

MRS. LAMBERTS: I believe that was not my question.

MR. LEWIS: Well, your mind is made up, Mrs. Lamberts.

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(59)

MR. LEWIS: May I have some action then by the committee on issuance of subpoenas? May I request the City Clerk be authorized to give me the necessary subpoenas? Some witnesses I have have to come from work.

THE CHAIRMAN: As long as we told you to provide your witnesses at the next hearing, I don't see why we can't provide him with subpoenas.

MRS. LAMBERTS: Mr. Chairman, is there some way we can determine whether this is relevant to the question of the purpose of the hearing?

* * *

MR. LEWIS: Since Mr. Johnson has made his statement, it has come out in the newspaper, it has been on the radio, in fact, it was even in one of the highschools. People have come to me and said, I didn't know you were hot tempered. I have had to meet it and I have been embarrassed by it. I am going to demand the right to

(60)

meet those things. Right at the present time, I don't know what Mr. Johnson's impressions are. I did re-

ceive from Mr. Miller a part of what he said. So far, I don't have a full statement of what was said at the first meeting.

MRS. LAMBERTS: I would like to ask the City Attorney if this is relevant to this question of revocation of this license?

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EXHIBIT 2 — Hearing before the Safety Committee of the City of Grand Rapids, November 13, 1962

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(1)

MR. BARTO: Mr. Miller, will you bring us up to date in this matter?

MR. MILLER: This is the fourth meeting of the Safety Committee on the question of the revocation of the license for Barnett's Bar held in the name of Patricia Ettress. The previous meetings were held on October 16, 1962, October 24, 1962 and November 7, 1962. Mr. Chairman, it is the contention of the City of Grand Rapids this license is held in the name of Patricia Ettress and never has been transferred to any other person. Patricia Ettress has asserted no interest in this license and has appeared at none of the hearings, although served notice. • • •

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MRS. LAMBERTS: I think we better set the ground rules.

MR. DE GROOT: I second that motion.

MRS. LAMBERTS: I would suggest we give Mr. DeGroot and Mr. Lewis a certain maximum amount of time and then declare the hearing adjourned — that this hearing continue for one hour?

(3)

MR. LEWIS: I would say, Mr. Barto, that would be unfair and illegal. You cannot call a hearing, take a month

to present the City's case and all of a sudden decide the Respondent has one hour to present his case.

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MR. MILLER: May I ask Mr. Lewis whether he contests the fact that we claim and have shown he is not the licensee of the establishment?

MR. LEWIS: I don't contest the license is in my name. That is not the issue. The issue is that someone wants to do something to get me out of this license and this is being attempted.

MR. MILLER: We only contend you don't have a license.

MR. LEWIS: You are saying on Page 4 your memorandum the committee has the right to overrule what is done in court in this matter — the same as Mrs. Lamberts has done by complaining to Circuit Court.

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MR. MILLER: You don't contend you can operate without a transfer do you?

MR. LEWIS: I have been operating since 1959 with the same power and authority I have now and that is what someone here seems to ignore.

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MR. LEWIS: I am not responsible for all of the delays in the hearings before this committee. We anticipated it would take not more than sixty days.

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MR. BARTO: As far as anything else that has gone on, even though you have operated with court permission, or without, or Patricia Ettress' permission — that has nothing to do with what we are doing now. The question is whether this license should be placed in escrow or revoked issued to Patricia Ettress.

MR. LEWIS: This has been tried — to place this in escrow and it could not be done legally that way, so now you have threatened revocation unless it is done voluntarily. The whole purpose of this hearing is to get at me.

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MR. LEWIS: I would say this: I am going to insist allowing everything to be taken up in this hearing. You have brought up most of the things relevant to revocation and I insist we have witnesses on each and every point. I cross-examine every city witness and I am able to present witnesses to every point presented. For instance, three weeks have elapsed since remarks made by the Chief of Police about me have gone into the newspapers.

MRS. LAMBERTS: Do you care to ask the Police Chief a question or two regarding the question of revocation of this license? We are not interested in any other subject?

MR. LEWIS: You have been interested in a lot more subjects.

MRS. LAMBERTS: The more you argue the less time you will have.

MR. VANDEN BERG: What are your plans?

MR. LEWIS: First, to restate some of the notes I have here and then to continue cross-examination of Mr.

(8)

Arens. That was my original plan, and then go into some questions with the Chief of Police.

MR. BARTO: Are they in regard to the transfer?

MR. LEWIS: Not necessarily. When I, as a lawyer, question a witness I am not in position always to say what I am going to ask specifically.

MR. MILLER: I suggest we ignore the testimony of Mr. Arens of last week and Mr. Lewis be given the opportunity to proceed.

MR. LEWIS: I certainly do not agree to that procedure.

MRS. LAMBERTS: I move we follow the procedure suggested by the City Attorney.

Exhibit 2 — Safety Committee Hearing, Nov. 13, 1962

MR. LEWIS: You feel you are able to throw out of your mind all of Mr. Arens' testimony, the majority of which was in answer to questions from you?

MRS. LAMBERTS: My motion is we proceed to disregard the testimony of Mr. Arens and Mr. Lewis be allowed to proceed to ask questions of the Police Chief and Lt. Szumski relative to this question of revocation.

MR. VANDEN BERG: I think I will have to agree with Mr. Lewis. We might be able to do this but this testimony has been imbedded in our minds and will influence us. I wonder if we could do something radical and

(9)

declare the whole hearing to be a mistrial, throw it out and start from scratch. We start from scratch and we start at this moment and continue for forty-five minutes and we discuss nothing but the question of revocation. That we get real technical as to who is the licensee and who, in fact, operates this and we will judge solely by that.

MRS. LAMBERTS: I will second that.

MR. BARTO: You said Mr. Arens' testimony has been imbedded in our minds.

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MR. VANDEN BERG: I think, then, we can be done by twelve o'clock if we start from scratch at this moment.

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I think Mr. Lewis has a right to ask questions of the Police Chief and Lt. Szumski. Mr. Lewis, now if you would like to ask questions of the Chief and Lt. Szumski you may do so.

MRS. LAMBERTS: Relative to the revocation issue.

MR. LEWIS: I wanted to ask Mr. Arens questions in reference to the revocation too.

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MR. LEWIS: May I preface it by some things as a matter of record?

MRS. LAMBERTS: Only if it pertains to the revocation issue.

MR. LEWIS: Some things are going to be in this record and if you want to you can strike them from the record. The first thing I would like to say I have said, in part, before. In this hearing it is very clear that Mrs.

(11)

Ettress and her attorneys have never made any complaint about my relationship to this license. The reasons which have heretofore been given, or part of those reasons, are not applicable to any activity as a licensee, as distinguished from an attorney or another person. I would like to state in the first of these hearings a question was asked by Chairman Barto with reference to why no explanation was ever given for change on the form 1800 of the Liquor Control Commission.

These hearings, and particularly the first of these hearings, have always been held under the threat to me personally by Mrs. Lamberts. Mrs. Lamberts has threatened me with an investigation by the Governor, which I welcome. I suggested a Bar Association censure if I had done anything wrong. She also threatened that and in several of these hearings I have personally been given ultimatums. Mrs. Lamberts brought up, in the first hearing, the fact Judge Hoffius issued an injunction in this matter which was in direct connection with the issues in this case and the case was there before that court.

I notice in Mr. Miller's statement on Page 4 of his so-called memorandum that he states, "Illegal proceedings give rise to an illegal operation of this bar."

Now at the meeting of October 16 Mrs. Lamberts stated

(12)

— and I don't know whether the record will show it, but I took it down — the Chief of Police and Lt. Szumski had given reasons for the denial, although I have heard other members say no reason had ever been given in this committee, and I think it has been so reported in the newspapers prior to the November 7 hearing. I pointed out to this

committee the Liquor Control Commission and its authority under the statutes is completely aware of this operation. It is the one which issues licenses, has investigators including Mr. Arens who knows about the situation.

Mr. Vanden Berg has raised the question in regard to Mrs. Ettress and the money being made from the bar. I don't know whether he has been informed, but I have a copy of the transcript of the testimony of Mrs. Ettress before Bankruptcy Court October 4, saying she had someone else picking up the money in this bar and all the money was not accounted for to her.

Now in the meeting of October 24 certain reasons were stated by the Chief of Police as grounds for refusal of the transfer. Two or three of those reasons did not apply at the time and could not have applied at the time because the conditions which he claims did not exist then. The reason for applying for the plural responsibility I had in this

bar was a matter that was not within the province of the Chief of Police. It was a matter concurred in by the Chief of Police in May 1959 and directed and controlled and approved by the Liquor Control Commission. I would like to point out to this committee that they do not have jurisdiction and it is like pouring water on a duck's back. Section 5 and 7 of the statute state only the Liquor Control Commission makes its own regulations and only the Liquor Control Commission can determine its regulations have been violated. The City Safety Committee, in spite of the fact no citations and no hearing have been held before the Liquor Control Commission, are now saying the Liquor Control regulations have been violated. The City Commission has requested an investigation on the same rules now used from the Liquor Control Commission and there has been no citation on the investigation.

One other thing, at the July 24 hearing Mr. Miller ruled there was no violation of the Liquor Control rules. Mr. Arens restated that rule and that there were no violations of the Liquor Control regulations. I would like to point out that because of statements made, particularly No. 4,

would be in the nature of you passing a new rule and then applying it to this case which is unconstitutional and illegal.

The other reason stated by the Chief of Police was relat-

(14)

ing to my representing persons who were arrested. That is not worthy of the Chief of Police or any official because it is my duty to represent people who come to me as clients and I will be in a position to have the Chief of Police control who are my clients. That is the extent of what I want on the record.

MR. MILLER: Do you claim you own this license or have some right to operate under this license? I think we ought to clarify that.

MR. LEWIS: I have repeatedly said, Mr. Miller has ruled, and Mr. Arens restated that under the resolution there is no violation of the liquor control law. I have pointed out to the committee that under Section 7 and Section 5 no one other than the Liquor Control Commission can determine Section 17 or Section 31 of the liquor regulations have been violated. In other words, what you do here is put me on the horns of a dilemma. The Liquor Control Commission says it is legal and because someone here doesn't like it they are trying to say it is illegal. As was pointed out by the Attorney General in this case you could not suspend this license and place it in escrow without cause and they said, of course, the City Commission couldn't do it, but even the Liquor Control Commission cannot do it under the statute without a hearing and with-

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out proof the liquor control regulations were violated.

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MRS. LAMBERTS: I think the record should be clarified. After the first session of this hearing the City Attorney asked me to go to his office to talk to Al Lewis. My

mistake was in complying with that request. I never should have gone, obviously.

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MRS. LAMBERTS: I request, then, his remarks about me be stricken from the record.

(16)

MR. LEWIS: I have no objection to the remarks being stated on the record.

MRS. LAMBERTS: There was a statement made by me regarding the legality of this operation and perhaps the ethics involved and Mr. Lewis told me if there was a question of his professional ethics I should go to the Bar Association and I simply told him I had considered doing so. Someone else has done so. I also stated I had considered whether or not the Governor should be asked to make a complete investigation of this whole matter. I said I was considering it, that is all, and I am still considering it.

MR. LEWIS: At that same meeting Mrs. Lamberts stated very flatly she had no objection to the bar continuing to operate so long as I had nothing to do with it. She said the bar could operate with anyone else except, "I don't want Al Lewis to have anything to do with it".

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MR. BARTO: I think we have heard anough about what was discussed between you. Now, Mr. Lewis, would you like to ask some questions of the Chief and/or Lt. Szumski?

(17)

MRS. LAMBERTS: Relative to this question only.

MR. LEWIS: Relative to any question which has come up in this hearing.

Exhibit 2 — Safety Committee Hearing, Nov. 13, 1962
Testimony of William Johnson

Chief of Police, WILLIAM JOHNSON, having been previously sworn, assumed the stand.

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MR. LEWIS: Mr. Johnson, do you have a copy of Form 1800 dated May 15, 1959?

(18)

MR. JOHNSON: May 15, '61?
Q. '59.
A. Yes, this is the one.

• • •

Q. And a copy of that was filed with the City Clerk and Liquor Control Commission?
A. I am assuming they were. That is the usual procedure.

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MR. LEWIS: At that time, Mr. Johnson, I was in-

(19)

vestigated by the Grand Rapids Police Department as manager of the Barnett's bar?
A. Yes, sir.
Q. That was approved at that time?
A. Yes, sir.

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A. While Lt. Szumski is going through the records — at the time of our hearing subsequent to the Liquor Control Commission hearing it was evident you were representing Mrs. Ettress and thereby you were attorney for the bar and also represented her.

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Exhibit 2 — Safety Committee Hearing, Nov. 13, 1962
Testimony of William Johnson

(22)

Q. Did you, or someone at your direction, write to the Liquor Control Commission and ask for a new investigation of this transfer?

A. That request was made, as I recall, by Lt. Szumski.

(23)

Q. When was that request made?

A. I would refer that question to the Lieutenant. It was in the spring of 1962.

Q. I am going to object to Lt. Szumski coming to the witness and giving him information.

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MR. LEWIS: • • • Is it true, Mr. Johnson, prior to April of 1962 you made a request to the Internal Revenue to close this bar?

A. Formal request I did not make.

Q. Any type of request?

A. I discussed this with the Internal Revenue.

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(24)

A. My position was the same as today. I felt because of delinquent city taxes and federal taxes certainly you, as a prospective licensee, would be undesirable. I made that clear to Mr. Forell.

Q. So at that time your position was, because Mrs. Ettress owed taxes, I was undesirable for this transfer, is that correct?

A. That is substantially correct.

Q. Did Mr. Forell claim to you that I, Alphonse Lewis, Jr., owed these federal taxes under discussion?

A. You, as a personality, did not enter the picture.

Q. Was it your position the license should not be transferred?

A. That is correct — transferred to you.

Exhibit 2 — Safety Committee Hearing, Nov. 13, 1962
Testimony of William Johnson

Q. You knew if the license was transferred the taxes would be paid, didn't you?

A. I did not.

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(25)

Q. Did you know the federal tax liens on this property had been released prior to this time, and some other tax liens had been released?

A. I did — some of them had.

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(26)

A. Yes, they said in the letter of April 6, 1962, and this is addressed to the Police Department:

"The 1961 license has been returned to the location being operated under power of attorney issued by the licensee."

Q. That letter was never brought to the attention of this committee until some time in July when a copy was sent to Mr. Kilpatrick for this committee?

A. I believe the members of this committee were well aware of the existence of this letter, Mr. Lewis.

Q. If the members were aware of it, will you tell us why they passed a resolution asking under whose name the Class C license was now being operated and who the licensee was supervising the operation?

A. Again, I am not under the position to second-guess the Safety Committee, but that was a confirmation of what they suspected and knew.

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A. I discussed it with the members of the committee — not the letter itself, perhaps — but the substance in which they referred to the complexity of this whole thing.

Q. On July 31, 1961 do you know whether or not Barnett's Bar was open from twelve to two on Monday morning — July 31, 1962.

Exhibit 2 — Safety Committee Hearing, Nov. 13, 1962
Testimony of William Johnson

A. I do not know as a fact it was open from twelve until two. I understood you were considering it and did later open during those two hours.

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(28)

Q. Let me ask you this: Do you feel it is within your authority as Chief of Police to assist a person in breaking written contract?

A. I do not.

Q. Isn't it true you told me in December of 1961 Mrs. Ettress did not want to sell to me; therefore, that was the reason you were holding it up?

A. I did, and the reason for that was that Mrs. Ettress came to our Department and discussed this in detail with Lt. Szumski. At no time did I ever try to have Mrs. Ettress break a contract.

Q. Did Lt. Szumski take a statement from Mrs. Ettress?

A. Yes.

Q. May was have it please?

MRS. LAMBERTS: Mr. Barto, I thought we had discussed at the beginning of this we were going to allow until twelve o'clock for Mr. Lewis to present what he wanted to present. It is five minutes to twelve.

MR. MILLER: We have in previous hearings estab-

(29)

lished the license was in Mrs. Ettress' name and she has since become bankrupt and asserts no control over the license but the bar is, in fact, operated solely by Mr. Lewis for his benefit. We feel at this time there has been no refutation of this evidence and that there is sufficient evidence for the City Commission to act at this point and sufficient evidence for them to form a decision. We have requested and do request this matter be brought to conclusion on what we claim to be a technically unlawful and illegal operation. • • •

• • •

Exhibit 2 — Safety Committee Hearing, Nov. 13, 1962
Testimony of William Johnson

(30)

MRS. LAMBERTS: ? • • Now, either we are going to allow him to control this or the committee to control it.

MR. BARTO: I think by listening to what he has to say — I don't think he is controlling the meeting. I am getting tired of a lot of this but when you set a definite time you give the impression your mind is made up and that is it. I know some of this is repetitious.

• • •

MR. LEWIS: When a committee sets a hearing and raises certain issues, then the issues go all over the lot. It may take quite a few witnesses to undo some of the things which have been said here. There is no question the committee has made up its mind; some of the members at least, but as was said before, I am not responsible for the delays. I tried in the beginning to limit the issues but

(31)

everything has gone into hearing, including why I don't bill my clients monthly.

• • •

MR. MILLER: Are you opposing the bankrupt's petition to have the license handed over to the Trustee in bankruptcy?

MR. LEWIS: No, but this committee has put us in a dilemma because it is so antagonistic and it is a threat

(32)

to the license.

• • •

MR. VANDEN BERG: I should like to move we officially close the hearing at twelve-fifteen. I don't believe we are going to get any testimony relevant to the determination of this committee's decision on the revocation of this license.

Exhibit 2 — Safety Committee Hearing, Nov. 13, 1962
Testimony of William Johnson

(33)

MR. LEWIS: That motion I object to and I think it is completely out of order because a committee could not make motions prior to the conclusion of a hearing. • • •

• • •

MR. MILLER: Do you have an appointment as receiver, or any other court appointment, allowing you to operate this license, or from the trustee in bankruptcy giving you authority?

MR. LEWIS: If you would look at the agreement before the Liquor Control Commission May 15, 1959 you will see the authority for control of this license was put in Circuit Court. All rights were transferred to Circuit Court and that court has exercised its rights by the issue of an injunction August 3, 1962. • • •

• • •

(36)

MR. LEWIS: Mr. Johnson, isn't it true that one time when I was talking to you, you said maybe Mrs. Ettress

(37)

wanted more money for this license? Do you recall that?

• • •

Now, Mr. Johnson, isn't it true under the Liquor Control Commission investigation financial arrangements for the sale and transfer of a license are investigated by the Liquor Control Commission prior to the time it is submitted to the Police Department for investigation?

A. That is correct.

Q. The financial arrangement is not in the province of the Police Department, is it?

(38)

A. We have an auxiliary interest in that, Mr. Lewis.

Exhibit 2 — Safety Committee Hearing, Nov. 13, 1962
Testimony of William Johnson

Q. You have an auxiliary interest in the financial arrangement?

A. That is right.

Q. All the licensee has to do is complain to you they are not getting enough money, or not enough net, and you feel you have responsibility in that connection?

A. We are in position to make it known to the investigators of the Liquor Control Commission.

MR. BARTO: Mr. Lewis, we agreed we were going to terminate this hearing at twelve-fifteen. As of today the hearing is terminated.

MR. VANDEN BERG: I move we adjourn.

MR. LEWIS: Mr. Barto, you will recall we agreed certain exhibits were to be introduced by Mr. Miller and myself. There are quite a few I would like to introduce. Apparently this committee has decided they do not wish to give me a full and complete hearing.

MR. BARTO: The committee will go into this and you will be notified by the clerk as to the outcome of this.

• • •

APPENDIX B

OPINION
(222 Fed. Supp. 349)

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALPHONSE LEWIS, JR.,
Plaintiff,

vs.

Civil Action No. 4431

CITY OF GRAND RAPIDS, MICHIGAN, et al.,
Defendants.

This action involves the denial of a transfer and ultimate revocation by the Chief of Police and the City Commission of Grand Rapids of the only negro-owned-operated Class C liquor license in a city of over 200,000 population.

Plaintiff Alphonse Lewis, Jr., a negro, claims the refusal to transfer the license of Barnett's Bar from Patricia Ettress Bell, a negro, to him and Dr. Cortez English, a negro, denied him his constitutionally protected rights of due process and equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Plaintiff further claims that William A. Johnson and certain City Commissioners conspired to delay and deny the transfer of the Class C license of Barnett's Bar to him in violation of the Federal Civil Rights Act of 1883.

The case was introduced first into the Federal District Court for the Western District of Michigan, Southern Division, in a voluntary bankruptcy proceeding by Patricia Ettress Bell, In the Matter of Patricia Ettress Bell, Bankrupt, In Bankruptcy No. 21,695-B.

The Bankruptcy Court issued restraining orders against the City of Grand Rapids and designated city officials, restraining them from taking any action which would adversely affect the claimed ownership by the Trustee of the license at Barnett's Bar.

Plaintiff Lewis commenced this action to secure his constitutionally protected rights, and to restrain the City of Grand Rapids and its designated officials from interfering with these constitutional rights.

To better understand this case, the Court presents a chronology of events adduced by the evidence.

Barnett's Bar and Lounge was owned and operated by Stanley Barnett until his death in 1946. The Bar was then operated by Stanley Barnett, Jr., as administrator, until his death in 1948.

Menso R. Bolt and Alphonse Lewis, Jr., operated the Bar thereafter as successor administrators of the Stanley Barnett estate. In 1952 the ownership of the Bar was transferred to Patricia Ettress, the minor daughter of Stanley Barnett, Jr.

During the minorship of Patricia Ettress, the Bar was operated by her mother, Louise Baldwin, and by her stepfather, Jesse Baldwin. Their agreement to purchase the bar from Patricia Ettress was never executed.

The Bar was closed for a period in 1958 and 1959, and was reopened in May of 1959. It is the judgment of this court that Patricia Ettress Bell found it difficult to finance the Bar's reopening and operation in May of 1959. She had to look ultimately to Mr. Lewis for the necessary finances.

In preparation for reopening the Bar, Patricia Ettress secured a loan of $3,000 from Alphonse Lewis, Jr., by executing a chattel mortgage to him covering "all licenses, all furniture, furnishings and equipment" in the Bar.

On May 15, 1959, the Grand Rapids Police filed their report with the Michigan Liquor Control Commission (hereinafter referred to as the "LCC"), approving Alphonse Lewis, Jr. as manager of Barnett's Bar and Lounge.

On May 20, 1959, Patricia Ettress and Alphonse Lewis, Jr. entered into a managerial agreement whereby Mr.

Lewis was to manage the Bar, exercise certain concomitant powers, and receive a specified remuneration for his services. The managerial agreement was drawn up at the suggestion and with the approval of the LCC and made a part of its public files.

No further incidents involving official action occurred until August 1960. At that time, a negro police officer for Grand Rapids, in the course of his duties, became suspicious of gambling activities in the basement of the building in which the Bar was located. He was convinced that Mr. Lewis, as manager, did not know of these activities and so informed Chief Johnson. This officer reported his suspicions to Superintendent of Police William Johnson. Chief Johnson then employed a Saginaw police officer, Sylvester Stephens, to investigate.

Officer Stephens frequented the Bar for the full first week of August. He turned over his information to the Grand Rapids Police, and this body raided the building some time in the early part of August.

On August 11, 1960, a violation report was filed with the LCC against Patricia Ettress, charging that gambling had been discovered on the premises of Barnett's Bar and Lounge.

About the same time, Patricia Ettress entered into an agreement to sell the license to one Frank Reynolds. The check tendered Mrs. Ettress by Mr. Reynolds turned out to be no good and the transfer was later cancelled.

On September 26, 1960, the Grand Rapids Police called the LCC and requested that any Commission hearings on the alleged gambling violation be postponed until the Police Court action was completed in Grand Rapids. A letter dated September 27, 1960 followed, explaining that to divulge information to the LCC at that time would seriously weaken the cases in Police Court, and thus, a postponement was desired.

Mr. Baldwin and Mr. Coogan attempted to purchase the Bar and license in October 1960. This application for transfer was withdrawn.

On November 10, 1960, Patricia Ettress entered into an agreement to sell the Bar and license to Dr. Cortez

English. The agreement was drafted by Alphonse Lewis in his office. This transfer was to be contingent upon the Reynolds transfer not going through. Papers were not filed on this application with the LCC until March of 1961, after Mr. Reynolds rescinded his agreement.

From December 9, 1960 to March 8, 1961, there were a series of communications between the LCC and the Grand Rapids Police concerning the status of the Police Court action on the gambling charges. The LCC was informed of a number of adjournments.

On March 6, 1961, formal applications for transfer were filed with the LCC by Dr. English and Mr. Lewis, as transferees, and Patricia Ettress, as transferor. These are the applications under consideration by all parties throughout this suit.

May 10, 1961, Patricia Ettress wrote a letter to Mr. Lewis terminating his position as manager of the Bar.

In May 1961, a Police Court hearing was held on the gambling charges. At that time four of the six parties charged were dismissed. Two of the parties were bound over to Superior Court.

On May 15, 1961, Mr. Lewis was added as a party to the November agreement to sell between Patricia Ettress and Dr. English. The amendment provided that Mr. Lewis would be a co-purchaser and partner with Dr. English. This apparently was verbally understood on March 6, 1961, when the parties filed their application for transfer.

On May 29, 1961, Mr. Lewis submitted to Patricia Ettress an itemized statement for $16,596.15 for loans and services rendered.

The LCC on June 2, 1961, asked both the Grand Rapids City Commission and the Grand Rapids Police to make their investigations of the pending transfer to Dr. English and Mr. Lewis. The letter to the Grand Rapids Police specifically stated that if the parties were not recommended for transfer, reasons should be given.

The same day, Inspector Andrew J. Spyk, Jr., of the Allegan enforcement staff for the LCC, filed his investigation report with the LCC. In it he recommended the trans-

fer be made, subject to the receipt of a birth certificate for Dr. English.

The investigation report shows that the established purchase price was to be $18,000, plus the cost of inventory, $400. The applicants were to invest $18,400 in the purchase in the following manner, according to Mr. Spyk's report:

$16,596.15 — the amount which the licensee, Mrs. Ettress, owed to Mr. Lewis for back salary as manager, for money advanced, and for services rendered as her attorney: $1,920 — money advanced to the licensee by Dr. English for sales tax payments, license renewal and payments on account with the Internal Revenue Department.

These two figures total $18,516.15, and Mr. Spyk's investigation report comments: "This is the amount which the licensee owes the applicants and will be paid in lieu of cash. Statements are attached".

The report goes on to show that the books and records of the Bar were carefully scrutinized and the Investigator recognized that there were tax liens against the present licensee. From the investigation, Mr. Spyk stated that he was of the opinion that the licensee, Mrs. Ettress, was the true owner.

Besides commenting that there was a violation pending against this establishment, the report shows that there existed also at that time a Department of Revenue stop against this license.

The Grand Rapids Police filed their investigation form 1800 with the LCC on July 11, 1961. The transfer was not recommended according to this form because of the pending gambling violations. The reasons for not recommending were set out on the back of the form. The reasons included a statement that Mr. Lewis was manager of the Bar at the time the raid took place.

Consequently, on August 7, 1961, the LCC denied the transfer due to failure to receive a favorable recommendation from the Police Department.

On August 21, 1961, Mr. Lewis requested an LCC hearing on the denial of the transfer claiming that the pend-

ing violation did not involve the licensee or himself. None of the parties charged in the Police Court action were parties to this transfer. In his letter, Mr. Lewis also pointed out that the transfer application had not yet come before the City Safety Committee.

August 23, 1961, agents of the Michigan Department of Revenue, armed with a warrant, attempted to close Barnett's Bar due to delinquent sales taxes. However, an agreement was entered into whereby the Department of Revenue would not close the Bar if $500 were paid that day on the delinquent taxes and if Patricia Ettress turned over all the management to Mr. Lewis. This was confirmed by a letter from the Michigan Department of Revenue to Mr. Lewis dated August 25, 1961.

The $500 was paid by Mr. Lewis, and Mrs. Ettress agreed to let him manage the Bar. From August 23, 1961 to September 21, 1961, Mr. Lewis operated the Bar as manager under this verbal agreement.

The Department became dissatisfied with the arrangement for paying the delinquent taxes, and wrote a letter to Mr. Lewis on September 12, 1961, emphasizing the need for weekly payments. It was pointed out that the Bar was open only at the grace of the Department of Revenue and that they were confident that Mr. Lewis would clear up the problem.

While negotiations were still going on concerning the State's sales taxes, the Bar was closed by the federal authorities on September 26, 1961, for delinquent federal taxes.

In October, the federal authorities held a public tax sale of the personal property at the Bar. The sale was made to Jesse Baldwin, however, he could not come up with the money and a new sale was noticed.

During October an attempt was made by Mr. Lewis and the federal agent, Mr. Forell, to have the Grand Rapids Police complete the investigation on the transfer and send the 1800 form to the LCC.

In answer to a letter of October 6, 1961, from the LCC, Officer Charles P. Skuzinski of the Gand Rapids Police, on October 11, 1961, reported that defendants Daniel Bethea

and Wayne Wofford pleaded guilty to the gambling charges filed in August of 1960 in the Superior Court for the City of Grand Rapids, Case No. 20097.

This report was false, and the events in regard to the gambling charges were as follows:

In May of 1961, an examination was held in the Police Court for the City of Grand Rapids. At that time the case against four defendants, including Wesley Calloway, was dismissed.

Two of the defendants, Daniel Bethea and Wayne Wofford, in Case No. 20097, were bound over to the Superior Court for the City of Grand Rapids.

After the police court hearing, a new warrant was issued against Wesley Calloway, owner of part of the building in which Barnett's Bar was located, charging him with possession of gambling paraphernalia. On June 12, he was arraigned in the Superior Court for the City of Grand Rapids and stood mute. On October 2, 1961, he entered a plea of guilty.

On October 11, 1961, Louis John Educato, deputy prosecuting attorney, petitioned the Superior Court for an order nolle prosequi against Daniel Bethea and Wayne Wofford, and the order nolle prosequi was entered pursuant to the petition on October 11, 1961.

All cases concerning Barnett's Bar, except the violation hearing pending before the LCC had been at this time closed, either by dismissal by the magistrate, or a nolle prosequi order in the Superior Court. The case in which Wesley Calloway pleaded guilty did not involve a violation of the gambling laws at Barnett's Bar.

On October 13, 1961, after dismissal of the charges, the LCC promptly sent the 1800 investigation forms to the Grand Rapids Police Department for its investigation in the transfer matter.

Mr. Lewis directed a letter to the LCC on October 16, 1961, requesting a speedy hearing on the gambling violation filed with the LCC. The letter contains a statement to the effect that the transfer is desired soon so that the sales taxes can be paid in full.

On October 18, 1961, a new management agreement was entered into between Patricia Ettress and Alphonse Lewis,

Jr., giving him broad powers in regard to the operation of the Bar.

October 21, 1961, Mrs. Ettress wrote to the LCC raising a question with regard to the proposed sale price of the license to Dr. English and Mr. Lewis. She wanted the purchase to pay all her debts.

The alleged gambling violation was heard by Kenneth J. Daniels, Commissioner of the LCC, on October 31, 1961. At this hearing, Mrs. Ettress was represented by Alphonse Lewis, Jr. At the close of the hearing that day, Commissioner Daniels stated:

> "Well, in regards to the second count, Counselor, unlawfully permit on the licensed premises, gaming or gambling, to-wit; accepting of and/or placing of mutual bet slips on August 5th, there is no testimony offered that any bet was made on that date, whatsoever. There was an attempt which was denied. I shall dismiss that. There is no evidence of gambling devices or paraphernalia, mutual bet slips, on the date of August 5th. I'm going to dismiss that, but I want to say this, Mrs. Ettress — there is no doubt in my mind there has been some gambling activities in your bar with the knowledge of your bartender, and the bartender's name slips me now, I believe Dan — he certainly had knowledge of what was going on. This is not permissible. I'm glad you're going out of the business and I understand you're going on?
>
> MR. LEWIS: Yes.
>
> COMMISSIONER DANIELS: I'm sure you'll be able to curtail the activities. If you're going to use the basement, I would suggest you partition a part of it off to use. I'll dismiss the charges against you here today, sir. That will be all."

An order was entered that day dismissing the charges.

Accordingly, on October 31, 1961, all matters concerning the alleged gambling violation had been disposed of, including the violation hearing before the LCC. From this

date forward, there were no gambling charges against Barnett's Bar.

According to the police investigation form 1800, the police investigation was made November 1, 1961. The form shows that recommendation for transfer was changed from "yes" to "no." It also says, "subject to final inspection," and points out that the parties intend to redecorate. No reasons were ever listed for the negative recommendation. None could be listed at that time, since the 1800 form had an affirmative recommendation until some time after July 31, 1962. The report was signed by Officer Skuzinski.

On November 1, 1961, Mr. Arens, LCC enforcement officer for Section 3, Allegan office, wrote the LCC stating that Officer Edward Szumski of the Grand Rapids Police requested a transcript of the hearing before Commissioner Daniels.

Some time in November, Mr. Lewis learned that a copy of the police investigation form 1800 had not yet been filed with the City Clerk. He and the federal agent again visited the police department to ascertain the status of the investigation. At that time they were told that the police were awaiting the transcript from the LCC on the hearing.

On November 13, 1961, Mr. Lewis as chattel mortgagee, purchased the personal property of the bar at the second federal tax sale.

On June 20, 1961, Andrew J. Spyk, Jr., investigator for the LCC, filed his report, in which he referred to the financial arrangement between the parties and stated that the investigation for the license transfer was complete. He called the gambling violations to the attention of the LCC.

On November 13, 1961, Mrs. Ettress sent the license to the LCC and asked that it be held in escrow. She stated that she considered the application of Dr. English and Mr. Lewis void.

December 5, 1961, Mrs. Ettress again wrote the LCC asking if the business could be run on a trustee or receivership basis. The transfer to Mr. Lewis and Dr. English would be agreeable if the price covered all her debts. She

requested that the license be removed from escrow and that Mr. Lewis be appointed Trustee to operate the Bar according to the terms declared by the Commission. She then requested reinstatement of the applications for transfer to Dr. English and Mr. Lewis.

On December 5, 1961, the Grand Rapids Police Department received the transcript of the hearing before the LCC.

December 14, 1961, Mrs. Ettress appeared in the police department offices and talked with Officer Szumski. She was accompanied by Wesley Calloway. At that time Officer Szumski took her statement to the effect that she did not want to transfer the license and receive in return a cancellation of her debt to Mr. Lewis. But she said she would favor a transfer if provision was made to pay all her debts.

December 15, 1961, a general power of attorney in favor of Mr. Lewis for Mrs. Ettress was filed with the LCC.

Mr. Lewis again approached the police department concerning their investigation. He talked to Officer Szumski in his office about completion of the 1800 form. Officer Szumski advised Mr. Lewis that the Chief of Police had said to "sit on" that form. Officer Szumski pointed to a drawer in his desk and said: "It's right in there and that's where it is going to stay".

Confusion was added at this time when Mr. Lewis learned that the LCC supposedly had called off the investigation. After Mr. Lewis found that the investigation was to continue, he was told by Chief Johnson that Mrs. Ettress did not want to transfer and, therefore, nothing had to be done.

December 19, 1961, five days after her statement to the police, Mrs. Ettress informed LCC enforcement supervisor, Mr. Arens, that she was not interested in transferring to Mr. Lewis and Dr. English, but that she would transfer to a Mr. Eaddy. The same day Patricia Ettress wrote the LCC asking to cancel the transfer to Mr. Lewis and Dr. English, and predicting the transfer to Mr. Eaddy.

The transferees, Mr. Lewis and Dr. English, then filed a suit in the Circuit Court of Kent County for specific performance, asking that Mrs. Ettress be ordered to perform the transfer agreement entered into November 20,

1960, and amended May 15, 1961. Included in this action was a request by the plaintiffs that Mr. Lewis be appointed receiver to run and operate the Bar. At a show cause hearing, Circuit Judge Fred N. Searl refused to appoint Mr. Lewis as receiver. Mrs. Ettress was represented at this time by Mr. Roger Boer.

There is a law in Michigan which holds that an action for appointment of a receiver is necessarily ancillary to some other court action, and that an interested party cannot be appointed receiver. See, e.g., M & M Nat'l. Bank of Detroit v. Kent Circuit Judge, 43 Mich. 363, 5 N.W. 627.

After this hearing, Mr. Boer withdrew from the case and Mr. Charles Dewey continued to represent Mrs. Ettress.

On January 3, 1962, Mr. Lewis sent to the law office of Newton Dilley, who employed Mr. Dewey, personal property tax returns for Mrs. Ettress.

January 11, 1962, Mr. Lewis directed a letter to the City Clerk requesting a hearing before the Safety Committee on this transfer.

On January 16, 1962, a meeting was held by the Safety Committee, at which the Barnett's Bar license transfer was discussed for the first time. At that time, one of the members of the Safety Committee was a local attorney, Mr. Berton Sevensma. When he learned that there was a Kent County Circuit Court case pending in this matter, it was moved that the hearing be adjourned in order that Mr. Sevensma might investigate the status of the court case and report back to the Committee.

On January 24, 1962, the LCC wrote Mrs. Ettress, approving her request for escrow of the license, and stated that the license would be so held until April 30, 1962, pending transfer.

On March 20, 1962, while the hearings before the Safety Committee were pending, the Circuit Court case between Mr. Lewis and Mrs. Ettress, filed December 21, 1961, was settled. According to the settlement agreement, Mrs. Ettress agreed to transfer the license to Mr. Lewis and Dr. English. It was agreed that Mr. Lewis would act as receiver for the operation of the Bar during pendency of the proceedings for transfer. He has acted in this position to date.

In addition to the cancellation of the $16,596.15 owed by Patricia Ettress to Alphonse Lewis, Mr. Lewis by this agreement was to assume and pay debts not to exceed $7,100 claimed to be due Dr. English, Taylor O'Harris, Decker, Davis & Jean, Mackey Insurance Agency, Arthur Kramer or Dorothy Kramer, doing business as Kent Bookkeeping Service; personal property taxes to the City of Grand Rapids, personal property taxes to the County of Kent, Michigan Department of Revenue taxes, including, but not limited to, sales and business activities taxes; Internal Revenue Department for taxes, including, but not limited to, 1959, 1960 and 1961 withholding, personal income taxes and 1959 excise taxes; $1,700 for attorney fees to the law firm of Rom & Newton Dilley; and to save Patricia Ettress harmless on all claims and obligations of Fred W. Poel, Rosalind Bolt Larson, the heirs and assignees of the estate of Menso R. Bolt, and from any claim of Arnold Levandoski, his estate, or his heirs or assigns.

This settlement agreement is plaintiff's Exhibit 50, and it is attached to this opinion as Appendix 1.

The same day a request was filed by Mrs. Ettress in the Circuit Court asking that the LCC, Grand Rapids Police Department, and Grand Rapids City Commission process and approve the transfer to Dr. English and Mr. Lewis and served notice that Mrs. Ettress withdrew her previous objections to the transfer.

March 21, 1962, Mr. Lewis delivered a copy of this request to Chief Johnson and to the City Clerk, the unofficial secretary for the Safety Committee, and to the LCC. Chief Johnson asked Mr. Lewis if there would not be another investigation, and Mr. Lewis replied that none was needed; one had already been made.

March 22, 1962, City Treasurer, Mr. Simon DeBoer, sent a list headed, "To Whom It May Concern", listing the personal property taxes due on Barnett's Bar and Lounge for the years 1959-1961, as $713.78.(1)

On March 27, the Safety Committee held another hearing at which this transfer was discussed. The settlement

(1) This list was requested by some person or persons whose names were not disclosed at the trial.

was given to the Committee. Commissioner Sevensma stated that he had examined the Circuit Court file and that the case had not yet been formally dismissed. Mr. Lewis replied that the case would not be dismissed according to the terms of the agreement until transfer had been completed. Commissioner Lamberts testified that the request for approval of the transfer by Mrs. Ettress and her attorney, Mr. Dewey, was before the Committee at this time. The hearing was adjourned without further action.

By the settlement Lewis agreed to pay all the taxes owed to the City of Grand Rapids, Kent County, the State of Michigan and the United States due from Patricia Ettress [resulting] from operation of Barnett's Bar.

On March 27, the transfer proceedings were in that condition from which the license could be transferred to Mr. Lewis and Dr. English, subject to payment of taxes by Mr. Lewis in accordance with this agreement. The differences between Mr. Lewis and Patricia Ettress were resolved under Circuit Court Action No. 65570, in which Patricia Ettress was represented by independent, competent, and reputable counsel.

The Safety Committee, Commissioner Lamberts, Sevensma and Barto, were fully advised by this settlement agreement of the fact that Patricia Ettress was the licensee and that Mr. Lewis was operating the Bar as receiver pending approval and transfer of the license to him and Dr. English.

March 29, Mrs. Ettress executed an assignment of all right, title, and interest in her Class C license to Mr. Lewis, subject to the approval of the LCC. This apparently is a standard procedure pending the transfer of any license, since the assignment is made upon a form provided by the LCC.

The same day Mrs. Ettress appointed Mr. Lewis as her attorney to operate, run, and supervise the license at Barnett's Bar. This power of attorney was to be revoked upon the transfer of the license with the approval of the LCC.

The following day, Mrs. Ettress and Mr. Lewis executed an agreement to the effect that the power of attorney did not affect the settlement agreement entered into on March 20, 1962.

All these instruments were filed with the LCC.

After receiving these settlement documents, the LCC through Mr. Edward F. Maloney, Director of the License Division, promptly sent a letter dated April 6, 1962, "Att: Chief of Police, Grand Rapids Police Department, Grand Rapids, Michigan" — advising the Chief of Police that, "We understand the violations and tax difficulties have all been resolved". And, "The 1961 license has been returned to the location where it is being operated under a power of attorney issued by the licensee".

Thus, the LCC promptly advised the Chief of Police that the Bar was reopened. The letter continued:

> "It is respectfully requested we be furnished the 1800 forms with whatever recommendation the Police Department intends, in order that we may clear up this matter as soon as possible.
>
> "We have a copy of notice No. 65570, in which the licensee, Patricia Ettress, requests the local authorities in Grand Rapids to permit the transfer of the license."

The letter also stated that the case had been complex and reminded Chief Johnson that the 1800 forms were sent to him on October 13, 1961. (See Appendix II.)

Immediately after receipt of the April 6 letter from the LCC, Chief Johnson tried again to close Barnett's Bar. With this purpose in mind, he called City Treasurer DeBoer and asked him if he had authority to close the Bar for delinquent city taxes. Mr. DeBoer informed Chief Johnson that he did not have this authority.

Failing in his efforts with Mr. DeBoer, Chief Johnson turned to Mr. Gordon Forell, local internal revenue service officer. Chief Johnson and Officer Szumski solicited the letter of April 12, 1962, plaintiff's Exhibit 7(A) (Appendix III). This in spite of the fact that Chief Johnson and the Safety Committee members were informed that by the settlement of March 20, 1962, Alphonse Lewis agreed to pay all unpaid city taxes, as well as the federal taxes referred to in the April 12, 1962 letter from Mr. Forell.

Chief Johnson was determined to keep the only negro-owned Class C liquor establishment closed. Both Chief Johnson and Commissioner Lamberts testified to many meetings in which they discussed the case of Alphonse Lewis and Barnett's Bar. Commissioner Lamberts joined Chief Johnson in his efforts to close again Barnett's Bar.

The next Safety Committee meeting was held on April 17, 1962. The Committee discussed the transfer. Present were Commissioners Barto, Lamberts, and Sevensma; Police Chief Johnson; Mr. Lewis; the City Clerk, Mr. Stanton Kilpatrick, and his secretary.

The letter to the Grand Rapids Police from Mr. Forell was presented, whereby the police were asked to cooperate in a stop order. This letter took Mr. Lewis by surprise, since he and Mr. Forell had worked together on getting the transfer culminated and had made visits together to the police.

When the Committee discussed the efforts of the City Manager, George Bean, to assist in this transfer, Mr. Lewis claimed that Mr. Bean had been told by the police that the investigation would be completed in a day or two. Chief Johnson claimed that was not what Mr. Bean had been told.

Mr. Lewis, who had asked Mr. Bean to investigate the delay by the Police Department in completing the 1800 form, said that Chief Johnson was lying in regard to Mr. Bean's action — and may have called Chief Johnson a liar. The Committee then insisted that Mr. Bean be called to clear up this conflict.

The testimony is in conflict as to whether Mr. Bean's statement before the Committee supported Mr. Lewis or Chief Johnson. Commissioner Lamberts testified, however, that Mr. Bean was never told just what Mr. Lewis's position was. She finally went to Mr. Bean after the meeting and discussed this matter in detail.

The City Clerk's minutes of this hearing show that Chief Johnson read two letters to the Safety Committee. The first was a letter dated April 10, 1962 from the LCC to Dr. English, asking whether the license was to be transferred to Dr. English alone, or to Dr. English and to Mr. Lewis as partners. The LCC was confused by the request for transfer filed March 20, 1962 by Mrs. Ettress

which said she withdrew her objections to transferring the license to Alphonse Lewis "or" Dr. English.

The second letter read to the Safety Committee was the Forell federal stop-order letter of April 12 which Chief Johnson had solicited. The minutes do not show that the April 6 letter from the LCC to Chief Johnson was introduced, which on its face would have overcome Chief Johnson's objections to the transfer.

Armed with the Forell letter and the April 10 letter, Chief Johnson sought to delay the transfer of this license.

By this time, it seems that at least Commissioner Barto was aware that the stop-order letter of April 12, 1962 had been requested by an officer in the Police Department. He was also aware that Chief Johnson had called City Treasurer DeBoer to see if he could close the Bar. Commissioner Barto testified that in a discussion with Chief Johnson outside the meeting, Chief Johnson told Barto that the reason he did not act on the transfer was the federal stop-order letter.

According to Commissioner Lamberts, it was the action of Mr. Lewis at this meeting that created her dislike for him. It is her claim that when Mr. Lewis called Chief Johnson a "liar" or said he was "lying," an evident hatred of Mr. Lewis appeared.

On April 19, Mr. Lewis directed a letter to the LCC in answer to their letter of April 10, stating that the transfer was to be made to Dr. English and himself as partners. A copy was furnished to the Safety Committee. It was clear at this time that the transfer was to be made to the partnership.

On April 30, 1962, the application for renewal of the license at Barnett's Bar was filed with the LCC, signed by Mr. Lewis as attorney in fact. Receipt of the $500 fee was noted. The renewal was granted.

Some time between April 17 and April 22, Chief Johnson, through Officer Szumski, contacted district supervisor Arthur Arens and requested a new investigation by the LCC. This was a studied attempt by Chief Johnson to shift the tactic of delay to the LCC.

As a result of this conversation, on April 27, 1962, a memorandum was sent by Mr. Arens to Mr. Walter M.

Noack, in which reference was made to the LCC letter of April 6; to the Forell letter of April 12; to the claim that the Grand Rapids Police Department had no notice of the power of attorney; and to the fact that Patricia Ettress was remarried and now living in Flint as Patricia Ettress Bell.

The answers to all these questions were contained in the March 20, 1962 settlement agreement, the letter of April 6, the power of attorney on file with the LCC, and, in addition, in the application for renewal of the 1962-1963 license.

In response to the request of the Grand Rapids Police Department, on May 1, and in answer to a letter of Mr. Arens, area enforcement supervisor, the LCC authorized a reinvestigation of this transfer. The following day, the LCC sent a communication to Mr. Arens asking him to accompany the investigator on this transfer. The LCC sent the previous investigation completed by Mr. Spyk and new investigation forms to Mr. Arens.

The same day, May 2, the LCC sent its form letter to the Grand Rapids City Commission asking that they take the usual action on this transfer and either recommend it for approval or disapproval. The Commission also sent its form letter to the Grand Rapids Police Department requesting that they investigate and stated: "If you do not feel that the applicant or applicants are qualified for licensing will you kindly give your *reasons in detail,* using the back of the 1800 form . . ." (Emphasis added.)

On May 11, Mr. Arens sent a communication to the LCC stating that the delay in the LCC investigation was caused when Mr. Lewis told him that all the Bar's books were not available and would inform Mr. Arens when they were available.

Mr. Arens testified at the November 7 revocation hearing, however, that the first time he went to Mr. Lewis's office he was told that all the books needed were in a box which Mr. Lewis *showed to Mr. Arens.* Without looking at them, Mr. Arens claims that they were not all there, but admitted that Mr. Lewis pointed them out. Mr. Arens did not examine these books at that time.

Mr. Lewis claims that Mr. Arens would not look at the books at that time because Mr. Arens first wanted to talk with Mrs. Ettress. Mr. Arens's testimony on November 7 supports this. Mr. Lewis agreed to attempt to reach Mrs. Ettress at her new home in Flint and to have her come to Grand Rapids for an interview. Any delay in the LCC's second investigation at this time was caused by Mr. Arens's demand that Mrs. Ettress come to Grand Rapids and his refusal to look at the Bar's books until Mrs. Ettress was interviewed.

On May 28, Mr. Lewis wrote a letter to Mrs. Ettress asking when she could come to Grand Rapids to see Mr. Arens. No answer to this letter was ever introduced at the trial.

June 1, 1962, the Michigan Department of Revenue wrote Mr. Lewis stating that they had reinstated the license, but still held a stop on the transfer. They wrote that they expected Mr. Lewis to clear up the tax problem.

Although the Safety Committee had full knowledge of the named licensee, the receiver-attorney-in-fact Lewis operation, and the obligation of Mr. Lewis to pay all taxes — facts contained in the March 20 settlement agreement and the April 6 Maloney letter from the LCC, Commissioner Lamberts at the Safety Committee hearing on June 5, blandly stated that she did not understand the situation and asked that another communication be directed to the LCC for clarification.

Obedient to this instruction, the City Clerk wrote a letter on June 7 addressed to the LCC, it contained two questions:

> "1. Under whose name is the Class C establishment located at 58-60 Ionia Avenue, S.W., Grand Rapids, now being operated and is the present licensee personally supervising the operation?
>
> 2. What is the status of the above application?"

Chief Johnson, Commissioner Lamberts, and any of the City officials could have determined the answer to the first part of question number one by simply going to Barnett's

Bar and looking at the license which, because of the law, would be hung in a conspicuous place in the Bar.

As stated above, they had the answer to the second part of question number one, as well as to question number two.

This letter was a tool in the tactics of delay and denial.

On June 8, Supervisor Arens wrote the LCC that he was holding the preliminary investigation in the district office; that Mr. Lewis was to notify him when the books were ready; that he attempted to see Mr. Lewis on the 6th, but that Mr. Lewis was not available. Yet, he failed to examine the books in Mr. Lewis's office.

Mr. Arens and Mr. Lewis met on the 12th of June in Mr. Lewis's office. Mr. Arens asked Mr. Lewis to write a letter to the LCC stating that the postponement in the investigation was due to the unavailability of Mrs. Ettress. The letter was dictated by Mr. Arens, and taken back to the Allegan office. The actual letter was not received by the LCC until August 6, 1962.

On June 18, Mr. Arens wrote the LCC that Mr. Lewis had requested more time in order to secure additional information concerning the transfer. This letter was followed on June 22 by Mr. Arens with a communication stating that the delay was due to the letter of June 12 asking to have the investigation postponed.

On June 29, Mr. Arens again wrote the LCC saying that he was going to meet with Mr. Lewis on July 3; it appeared however, that Mr. Lewis was unable to secure the necessary papers to complete the transfer.

Another letter was sent by Mr. Arens to the LCC on July 9, in which he stated that the LCC should order Mr. Lewis to allow the investigation to be completed. These successive letters are inconsistent with the letter dictated by Mr. Arens on June 12, whereby the absence of Mrs. Ettress was given as the reason for the delay. She was as available to Mr. Arens as she was to Mr. Lewis. In normal procedures, field investigators from the LCC assist each other throughout the state on interviews.

Mr. Arens knew, understood, and participated in Chief Johnson's and Commissioner Lamberts' program of delay and denial.

As an example of his confused testimony, when asked why he thought a reinvestigation was needed, Mr. Arens replied that there was bankruptcy involved. No bankruptcy issue arose until September 10, five months after the LCC issued orders for the reinvestigation.

Mr. Arens also listed the dates when he tried to contact Mr. Lewis; parallel to these dates were dates on which he did talk to the police. Mr. Arens admitted that he worked closely with the Grand Rapids Police, so it is not surprising to find his manner evasive when certain questions concerning the police were asked.

At the regular Safety Committee meeting of July 24, the transfer transaction took on heightened importance. Present were Commissioners Barto, Lamberts and Vanden Berg (who had replaced Commissioner Sevensma on the Safety Committee as of May 1, 1962). Various representatives of the news media were present with cameras and tape recorders. The transfer and its ramifications already had received considerable coverage by newspapers and radio and TV broadcasts. Mr. Lewis, Dr. English, Mrs. Ettress, her attorney Mr. Dewey, Chief Johnson and the City Attorney were also present.

Seeking further reasons to delay this transfer, Chief Johnson stated that Mrs. Ettress, the licensee, lived in Saginaw, although she actually lived in Flint. Chief Johnson claimed this was not desirable. This information had been communicated to Mr. Arens and it was contained in his interoffice communicaton of April 27, 1963.

The City Attorney, however, pointed out that it was not a violation in itslf for a licensee to live in another city. He cited Mr. Schuler, of Schuler's Restaurant, as an example, and said other licensees did the same.

Federal Agent Forell's letter of April 12 to Chief Johnson about delinquent federal taxes was discussed. Mr. Lewis claimed Chief Johnson solicited this letter; but the transfer of the license could be approved subject to payment of all delinquent taxes through an escrow agreement.

Then, various city and federal tax problems were discussed. Commissioner Barto asked just why the transfer could not be approved subject to the payment of taxes.

Mr. Lewis agreed that this was the simple and usual way to remove the impediment of unpaid taxes.

When Commissioner Vanden Berg asked Chief Johnson if all the tax problems had been resolved and what his recommendations were, Chief Johnson held up the Forell letter, and said that he recommended disapproval because of this alleged federal stop order. This is the only reason Chief Johnson ever gave for denial of the transfer at any public Safety Committee or City Commission hearing when Mr. Lewis was present prior to the October 24 meeting.

When the discussion turned to payment of taxes through an escrow agreement, City Treasurer DeBoer objected to anyone being made escrow agent except himself. In fact, Mr. DeBoer testified that an arrangement had been made for money to be placed in escrow to pay the outstanding taxes. Therefore, on July 24, when Chief Johnson held up the Forell letter as a reason for denial, his objection was without any substance.

Commissioner Lamberts pointed out that the Safety Committee had not received an answer to the Committee's letter to the LCC of June 7. When Mr. Lewis reminded the Committee that the letter of April 6 from the LCC to the Grand Rapids Police answered their questions, Commissioner Lamberts said she refused to accept this letter as an answer to the Committee's letter — an obviously dilatory tactic.

Commissioner Barto agreed that the April 6 letter answered in substance the Commission's questions posed in the June 7 letter.

According to Commissioner Barto and the minutes of the July 24, 1962 hearing, Commissioner Lamberts said there would be no decision on this transfer until the letter of June 7 was answered. All persons present seemed to agree that the meeting was adjourned so that another letter could be directed to the LCC and a definite answer could be obtained to the questions posed by the Committee. Clearly, the hearing was adjourned for three weeks.

Before adjourning, the Committee asked Mrs. Ettress to make a statement in regard to this transfer. She stated that the transfer was satisfactory to her as long as all her debts were paid. Her attorney was asked for his position,

and Mr. Dewey stated that the settlement filed on March 20 was proper and that a transfer to Mr. Lewis and Dr. English was in the best interests of his client.

Dr. English made an important statement at this hearing. When given an opportunity to speak, he said he was disturbed because no reason had ever been given him for the the Committee's apparent disapproval of this transfer. Someone on the Committee said that this had nothing to do with Dr. English.

Dr. English's impressions of the nature of the hearing were that he was treated more as a criminal than as a citizen looking for a license. He believed that Commissioner Lamberts' attitude was very hostile, but that Commissioner Barto was at the same time most courteous.

The Commissioners knew Dr. English did not want to operate the Bar alone. He was only interested in the operation if Mr. Lewis would run the Bar.

No one except Commissioner Lamberts and Chief Johnson cauld recall that reasons for apparent disapproval of this transfer were given at this open meeting, or at any previous meeting at which Dr. English or Mr. Lewis was present.

Chief Johnson specifically testified at the November 30, 1962 show cause hearing that the first time he gave reasons at a meeting at which the transferees were present was October 24, 1962, a hearing on revocation. He attempted to qualify this in his testimony at the trial, but was obviously attempting to patch up the absence of reasons given before disapproval of the transfer on July 31. In this respect, his testimony is self-contradictory.

Commissioner Lamberts claims all matters discussed at the hearings were reasons for disapproval of the transfer.

This court finds as a matter of fact that no reasons, other than Chief Johnson's reference to the Forell letter, were ever given.

Commissioner Lamberts claimed that a specific reason for the delay of any decision on the transfer was because the new investigation authorized on May 2, 1962, had not yet been completed by the LCC. Yet, this did not seem to hamper the Safety Committee on July 31 when it finally adopted a resolution disapproving the transfer, because the

LCC's reinvestigation was at the instigation of Chief Johnson, and it was used as an excuse for delay.

After the July 24 hearing was adjourned for three weeks, someone on the Committee decided that the Committee should talk to Mrs. Ettress alone to find out what her real attitude was toward this transfer. Commissioner Vanden Berg said that he felt Mrs. Ettress was afraid to speak out at the public hearing.

The Safety Committee took Mrs. Ettress into the City Attorney's office and questioned her without her attorney, Mr. Dewey, being present. It is noteworthy that although given the opportunity, none of the Committee members testified that Mrs. Ettress said anything at this private meeting different from what she had in the public hearing.

At this time Mrs. Ettress wanted the license transferred to Mr. Lewis and Dr. English. This was in her best interest. If the Safety Committee and the City Commission had acted favorably at that time, there would have been no subsequent bankruptcy.

There was a definite conflict in the testimony as to whether the hearings on this transfer concluded on July 24, leaving only the decision to be made, or whether the hearings themselves were adjourned for three weeks. Many present at the July 24, 1962, hearing were left with the impression that the hearings were adjourned to await the answer from the LCC to questions which the Safety Committee thought vital to the issues; the minutes reflect that this was done. It hardly seems possible that the decision only was adjourned.

On July 25 another letter was written by the City Clerk to the LCC seeking to find out whose name was on the license and if the licensee was personally supervising the operation of the Bar. However, the minutes of the July 24 hearing clearly show the Safety Committee was informed Mrs. Ettress was the licensee and Mr. Lewis operated the Bar under a power of attorney.

That same day, Commissioner Lamberts called the LCC and received orally the LCC answers to the questions raised by the Safety Committee's letter. She was informed at that time that the license was issued to Mrs. Ettress and

that it was being operated by Mr. Lewis under the power of attorney dated March 29, 1962.

August 3, the LCC formally answered the letters of the Safety Committee and pointed out that the information had been given to Commissioner Lamberts by telephone on July 25. The letter said that the information passed on by telephone was, in substance, that Mrs. Ettress was still the licensee and that the Bar was being operated by Mr. Lewis under a power of attorney.

The court finds that Commissioner Lamberts knew and understood these facts from April 17, 1963, and throughout all the remaining proceedings.

Although either the hearings or the decision was adjourned for three weeks on July 24, the Safety Committee at a regular meeting for July 31, passed a resolution recommending that the City Commission disapprove the transfer to Dr. English and Mr. Lewis. The transfer matter was not on the agenda for the July 31 meeting, but Commissioner Vanden Berg testified that all matters which had been tabled were automatically on the agenda.

Commissioner Lamberts testified that the decision to disapprove probably could have been made on July 24, except that the meeting was short. She stated that the decision was made on July 31, instead of three weeks after July 24, because it was discovered that two of the three members of the Safety Committee had planned vacations which coincided with a meeting date three weeks after July 24.

No one testified whether Commissioner Lamberts relayed her telephone-call information to the Safety Committee at that time. The Committee, however, did not wait for a formal answer to their letter of June 7, nor did they wait for the second investigation by the LCC initiated at the request of the Grand Rapids Police Department.

They passed at the end of the meeting two resolutions bearing on this transfer:

> "12801. Com. Lamberts moved that the request from Dr. Cortez A. English and Alphonse Lewis, Jr. for transfer of ownership of Class C license, located at

58-60 Ionia Ave., S.W., from Patricia Ettress, be recommended for disapproval.

Carried.

Yeas: Coms Barto, Jamo, Lamberts, Sevensma, Sypniewski, Vanden Berg — 6. Nays — 0."

"12802. Com. Lamberts moved that the City Commission request the Michigan Liquor Control Commission to suspend and place in escrow the Class C License, located at 58-60 Ionia Ave., S.W., issued to Patricia Ettress (Bell), until said license is transferred.

Carried.

Yeas: Coms. Barto, Jamo, Lamberts, Sevensma, Sypniewski, Vanden Berg — 6. Nays — 0."

The only written record taken at this meeting was the notes of the secretary to the City Clerk. According to these minutes: "Motion made by Com. Lamberts and seconded by Com. Vanden Berg that this request be denied on the basis of the Police Department recommendation and that a resolution be presented for action at the City Commission meeting. Motion carried."

Before January 16, 1962, and throughout the entire proceedings, Mr. Lewis sought reasons for both the police department's and the Safety Committee's delay in processing the LCC 1800 form and in acting on the application for transfer.

No reasons (other than the Forell letter) were ever given at any public meeting in the presence of Mr. Lewis or Dr. English.

Mr. Lewis requested a public hearing with the rights guaranteed by due process, examination, confrontation, and cross-examination of witnesses. This the Safety Committee and the City Commission steadfastly refused to do.

The court ruled any reasons not given in the presence of Mr. Lewis were inadmissable. Over the objection of the plaintiff, however, the court permitted the defendants to

introduce into evidence as part of a segregated record,(2) reasons which they claimed were the basis for their disapproval of the transfer.

It is claimed the Safety Committee communicated to the Committee of the Whole and the City Commission, its reasons for denial of the transfer. The court finds that the reasons, if any, were post factum to the July 31 meeting of the Safety Committee, the Committee of the Whole, and the City Commission.

These will be more fully discussed hereafter in this opinion.

Because of the action by the Safety committee and the City Commission which disapproved transfer, and on the advice of her husband, Mr. Bell, Patricia Ettress Bell, on August 2, sent a letter of revocation of the power of attorney she had given to Mr. Lewis to the LCC.

On August 6, 1962, the LCC on an interoffice memorandum summarized the history of this transfer and noted that the City Commission did not recommend transfer, but requested that the license be placed in escrow. A note was also made that Mrs. Ettress had filed a revocation of the power of attorney.

On August 6, the LCC filed an order denying the transfer to Mr. Lewis and Dr. English "after considering the unfavorable recommendation of the City Commission." The escrow question was referred to the legal counsel for the Commission.

Mr. Lewis wrote the LCC August 9, requesting a hearing on the Grand Rapids City Commission action because no reasons were ever given him in support of the disapproval.

Mr. Lewis wrote a similar letter to the City Commission on August 13 asking for a rehearing.

August 16, the LCC answered Mr. Lewis's letter and said "inasmuch as an appeal hearing before the LCC would not accomplish the result you desire, your request for a

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(2) Since this case was tried without a jury, a segregated record as such was not made. All evidence, however, which relates to post factum reasons given by the Commissioners in their testimony is, for the purpose of this case, considered as a segregated record.

hearing must be denied. We suggest you communicate with the Grand Rapids City Commission . . ."

In relation to the escrow problem, the letter notes: "It is the opinion of the LCC legal counsel that in the absence of any citation, due process, and hearing before the hearing commissioner, it is precluded from taking such action."

Another note in the LCC file at this time says: "Escrow is a voluntary arrangement by licensee; cannot be forced upon him without violation hearing."

On August 21, Judge Stuart Hoffius of the Circuit Court issued a temporary injunction restraining Mrs. Ettress from interfering in any way with the transfer of the license. This in effect invalidated her attempted revocation of the power of attorney until all transfer issues were resolved. This injunction was later set aside by the Circuit Court.

On August 29, the Grand Rapids City Commission denied Mr. Lewis's request for a rehearing on the transfer.

The City Attorney, James Miller, at the request of the Safety Committee, wrote the LCC on September 4 claiming violation of Rule 17 and Rule 31 of the regulations by Barnett's Bar, and requested the LCC to suspend the license. The letter stated the Committee's position that if the LCC could not take this action, then the Grand Rapids City Commission must consider revocation of the license.

Mrs. Ettress filed a voluntary petition in bankruptcy on September 10. She was represented in the bankruptcy proceeding by Mr. Frederick Poel.

September 12, Mr. Healy, attorney for the LCC, directed a letter to the City Attorney. Noting the City Attorney's letter of September 4, the Assistant Attorney General set out the steps necessary in finding a violation, if any, of Rule 17 and Rule 31 by Barnett's Bar. He stated an investigation would have to be made and certain hearings would follow before a violation of any Rule could be found.

On October 2, after citing certain facts about the license at Barnett's Bar, the Grand Rapids City Commission (or Safety Committee) ordered all interested parties to show cause why the license should not be revoked. The following day, the City Clerk sent letters to all interested

parties stating that the first show cause hearing would be held October 16.

On October 10, in preparation for the pending revocation hearings, Mr. Lewis distributed to all City Commissioners a statement of his position. In this statement, he challenged all the purported reasons for action taken against this license; he made further accusations in regard to the use of these reasons; and he demanded a fair public hearing, with the right to subpoena witnesses, cross-examine them, and have the hearings completely reported by a proper stenographer.

Commissioner Lamberts does not recall if this statement was introduced at a hearing when a reporter was present. The only transcripts available show conclusively that it was not. The challenges made by Mr. Lewis in this statement were never publicly answered, accepted, or denied by either the Commissioners or by Chief Johnson.

October 11, the City Attorney sent a carefully detailed letter to the City Commission setting out certain ground rules for the conduct of a revocation hearing. He specifically advised that due regard for proper procedure be had.

Commissioner Lamberts' comment on this letter was to the effect that the City Attorney only makes "suggestions" to the Commission, and that the Commission sets its own rules. She clearly intended to continue to disregard the constitutional, as well as the statutory mandates of due process.

The first revocation hearing was held October 16. No record of any nature was kept for this hearing. According to the testimony of certain parties, at least the following occurred: When ground number five[3] in the original resolution relating to criminal activity was challenged by Lewis, the City Attorney recommended that this provision be dismissed.

There was some confusion at this hearing as to whether the topic was revocation or transfer. It appears that Mr.

(3) "5. Unlawful activities have been allowed or suffered to take place in such bar, though, with proper management and control by the licensee and owner, the same should have been prevented, and . . ."

Lewis insisted at some of these hearings that what they were actually doing was rehearing the transfer issue.

At the time of this first hearing, at least Commissioner Lamberts was aware of the court injunction against Mrs. Ettress, and she stated that she did not object to this restraint. However, she did contact Judge Hoffius and discuss the matter with him.

Present at the second hearing on October 24 were the Trustee in Bankruptcy for Mrs. Ettress, Mr. Nichols, his attorney, Murray DeGroot, and Mr. Lewis. Commissioner Lamberts again demanded that the license be placed in escrow. At one point, Mr. DeGroot asked that Mr. Lewis be excused from the meeting so that a proposal could be made. This was done. When Mr. Lewis returned, the City Attorney, James Miller, asked Chief Johnson to give some "good" reasons why he objected to the transfer to Mr. Lewis.

Chief Johnson then gave as his reasons that Mr. Lewis did not have the proper temperament for a licensee; that as a lawyer he represented certain people in that location; that he was a borderline operator; that he needed an entertainment permit; and that he was open on Monday mornings from twelve o'clock to two o'clock — legal, but the other bars do not do this.(4)

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(4) 10/24/62 Safety Committee Hearing

Miller: Give us some good, definite reasons.

Johnson: We did not recommend against Dr. English. We recommended against the transfer to the partnership. Our objections are he is a borderline operator. He has occupied a plural roll (sic). He has held the power of attorney. He has likewise represented people in Superior Court, people whom we have arrested down there. In two instances your operation has been a borderline operation. You are operating from 12 to 2 o'clock Sunday night. I admit it is legal, but if all bars elected to stay open those hours —

Barto: If it is legal —

Johnson: What about your quasi entertainment? You are right on the borderline. We maintain you should have an entertainment license.

Lewis: It has never been required.

Johnson: Since 1959 you have had a plural association and arrangement at that location. You were Mrs. Ettress' legal counsel; you were her manager, you operated with a power of attorney, you represented people in court who were arrested at that location. Because of these overlapping responsibilities I cannot indorse your plurality of associations.

Commissioner Barto testified that so far as he recalls this was the first time any specific reasons were given for disapproval of Mr. Lewis as a licensee at a public hearing at which Mr. Lewis was present. Commissioner Jamo agreed that this was the first time *any reasons* were stated at a hearing, and this court so finds.

At the close of the October 24 hearing, Commissioner Lamberts moved that Mr. Nichols be requested to take the necessary steps to have the transfer completed to him and then to have the license placed in escrow.

A memoradum in the LCC file shows that on or about October 25, Commissioner Lamberts made a telephone call to someone in the Commission offices. The memorandum states that in summary she said the following:

(1) The LCC was shirking its responsibility with regard to this license;

(2) The County Prosecutor may ask for a grand jury investigation of the LCC in connection with complaints concerning Mr. Lewis and this bar; in reply, the LCC told Commissioner Lamberts that the Commission records were public and that they would be happy to make them available to a grand jury;

(3) She stated she was in sympathy with the Police department's unwillingness to approve Alphonse Lewis as a licensee because he makes his living defending criminal cases and his attitude toward the police in court is reprehensible; that the same kind of people whom he represents frequent the bar and she agrees with the police that this is not proper.

Richard Loughrin, who was Kent County's Prosecuting Attorney in 1962, testified he had not considered calling a grand jury investigation as claimed by Commissioner Lamberts.

Commissioner Lamberts and Chief Johnson would deny a license to Mr. Lewis because he practices as a defense

counsel in criminal cases. Such a denial would penalize an attorney for performing his professional duty as a lawyer.

Such a denial is invidious discrimination, because as is pointed out later in this opinion, other attorneys actively engaged in the practice of law have owned, and do own, liquor licenses or interests in a liquor license.

It would indeed be a sorry day in the history of Grand Rapids and this country if a lawyer should be penalized because he performs his professional duty as a lawyer.

On November 1, the Bankruptcy Court, after hearings, entered an order declaring the Trustee the owner of the license. The order was contested by Mr. Lewis, who claimed title in the license, and on November 7 a stay was filed, along with a petition for review of the order declaring the Trustee owner.

The third revocation hearing was held November 7. A court reporter was present and a transcript was made. The transcript shows in effect that certain witnesses were present and called to testify for the City. It shows that cross-examination of these witnesses was limited by the Safety Committee for those who had the burden of showing cause why the license should not be revoked. Particularly interesting, but confusing and contradictory, is the testimony of Mr. Arens.

At the close of the November 7 hearing, Mr. Lewis was in the process of cross-examining Mr. Arens. The Committee agreed that Mr. Arens would be considered under subpoena for the next meeting. At the next meeting on November 13, Mr. Arens did not appear for further cross-examination.

This failure, plus the actual testimony of Mr. Arens on November 7, affects the weight, sufficiency and credibility of Mr. Jamo's testimony in this case and his conclusion that Mr. Lewis failed to cooperate with Mr. Arens.

A reporter was present at the final hearing and a transcript of the proceedings was made. Certain witnesses were present for Mr. Lewis and the Trustee but the Commission did not allow these witnesses to be called. Chief

Johnson was not cross-examined thoroughly, because the Committee said it had set a time limit on the hearings.

At the close of the hearing, the Safety Committee recommended, after setting forth five reasons, that the license be revoked unless placed in escrow by November 20.

The effect of this resolution can only be seen when certain legal facts, known to the Safety Committee, are considered. First, the Bankruptcy Court had declared the Trustee to be the owner of the license, and, therefore, the only person who had a title interest in the license, and the only person who, according to the letter of the LCC, could place the license in escrow.

This order, however, was stayed, and was made subject to review by the District Court. This meant that the Trustee could not exercise his claim of ownership and place the license in escrow, or do anything else, such as take possession of it. Mr. Lewis by his petition for review had at least an inchoate interest in the license and became, along with the Trustee, a proper person to act in regard to the license.

Since escrow is a voluntary arrangement, and since both the Trustee and Mr. Lewis had reasons for not placing the license in escrow, the resolution was then, in effect, an ultimatum.

On November 14, the Bankruptcy Court extended its stay order. The same day the Trustee petitioned for and got a restraining order issued by the referee restraining the City Commission from acting further in regard to the license.

Also, on November 14, Commissioner Lamberts sent a telegram to Attorney General Kelley setting forth the Safety Committee findings in detail, and reporting that unless the license were placed in escrow by November 20, it would be revoked.

On November 19, 1962, Mr. Lewis commenced the present case in this court.

On November 20, the Safety Committee reported to the City Commission that because of their prior hearings and because of the fact that the license was not in escrow, the Committee asked the City Commission to pass a resolu-

tion requesting the LCC to revoke the license at Barnett's Bar. The report also noted that personal property taxes in the amount of $775.41 were due.

The resolution for revocation was adopted by the City Commission with only Mayor-Commissioner Davis dissenting.

November 21, the LCC wrote Commissioner Lamberts noting that her telegram to Attorney General Kelley had been referred to them. They recognized the bankruptcy jurisdiction concerning the license. The letter then pointed out:

> "* * * the Michigan Liquor Control Commission would be pleased to enter the Bankruptcy Court and request permission to comply with its statutory obligation to revoke this license upon being furnished with evidence showing that a proper hearing was held by the City Commission of Grand Rapids, after due notice, and that the City Commission acted to request revocation of the license.
>
> "This evidence should consist of a copy of the notice and proof of service, a certified transcript of the proceedings showing the dates of the hearings, and who were present and absent from the City Commission."

On this same day, the Bankruptcy Court continued its restraining order against the City Commission, subject to any determination in the Federal District Court on the case commenced by Mr. Lewis on November 19.

On November 21, this court issued a temporary restraining order and an order to show cause why a preliminary injunction should not be issued pending the final hearing of the claims in the suit filed. This order restrained the City Commission, its agents and employees, from sending the revocation resolution to the LCC and from taking any other action until the show cause hearing.

At the close of the hearing, the court continued the injunctive provision of the restraining order. The resolution was not sent to the LCC.

In late January or early February, during the pendency of this case, Commissioners Lamberts and Jamo drove to Lansing to discuss transfer, revocation, and this present litigation with the legal adviser to Governor Romney, Mr. Richard VanDusen.

They took with them specific exhibits and information about this case. They sought assistance from Mr. VanDusen to persuade the LCC to take action which by reason of the restraining order of this court they could not directly ask the LCC to do. They sought to have the LCC cooperate fully with the Grand Rapids City Commission. Commissioner Jamo testified he had read the restraining order and knew its contents.

This is clear and compelling evidence of the continuation of the conspiracy on the part of at least Chief Johnson and Commissioners Lamberts and Jamo to deny the constitutionally protected right of Mr. Lewis.

There are certain general facts found by the court that do not fit into the exact chronological pattern, but which are extremely important if one is to understand the whole fact picture. The testimony of certain witnesses also deserves comment.

Mr. Loughrin, former prosecuting attorney for Kent County, stated that no complaint was at any time filed with the prosecuting attorney's office concerning the action of Mr. Lewis, and that during his tenure into 1960 no request was ever made for a grand jury investigation concerning his matter. As far as he knew, the prosecutor's office never told Commissioner Lamberts that grand jury action was contemplated. Mr. Loughrin said he knew that there was animosity between Mr. Lewis and Chief Johnson, but that he could never pin down the source of it.

Prosecuting attorneys must work closely with the police department; this explains the fact that Mr. Loughrin had a very difficult time explaining Chief Johnson's attitude toward Mr. Lewis. Also, Chief Johnson was present in the court room at all times when Mr. Loughrin testified.

The City Clerk, Mr. Stanton Kilpatrick, said that he knew Mr. Lewis had made attempts to have the police investigation form 1800 filed with the City Clerk's office.

This form was never made available to the Safety Committee through the City Clerk before the disapproval of July 31. Safety Committee hearings on a transfer are not usually begun until all forms are on file, including the report of the police investigation, form 1800. Mr. Kilpatrick stated that it was unusual for the 1800 form to require eight to ten months to be transmitted from the police department to the Safety Committee.

In his nine years of investigation work for the LCC, Mr. Spyk said he had never seen a case where the police went into the affairs inquired of in this case. He could recall no other time when the police had questioned the financial arrangement behind the transfer; when the police had secured a statement from the transferor that she did not want to transfer; or that different taxes were owed by anyone connected with the license.

Negro Police Officer Dred Scott Madison stated that on his own investigation he gathered information concerning gambling in the basement of the building in which Barnett's Bar was located. He reported this to Chief Johnson, and also told the Chief that on the basis of his talks with Mr. Lewis, Officer Madison was certain that Mr. Lewis was unaware of the gambling. Officer Madison also testified that he could recall no raid on any other licensed business place in his sixteen years on the police force.

Dred Scott Madison claimed that Chief Johnson practiced discrimination, and cited his own demotion as evidence of this discrimination.

Mr. Charles Dewey, Mrs. Ettress' attorney after January of 1962, stated that the settlement arrangements made in March of 1962 were aimed at avoiding bankruptcy. He also testified that at the July 24 hearing he remembered hearing no reason given as to why Dr. English and Mr. Lewis were undesirable transferees.

Mrs. Ettress related that she had worked the day shift on the bar since 1959 unless some substitute was obtained.

Mr. Lewis claimed that Patricia Ettress Bell took some $30,000 out of the business.

Mayor Stanley Davis is by virtue of his position as Mayor also a City Commissioner. He was absent from the meeting of the Committee of the Whole on July 24, when it is claimed that reasons were given by the Safety Committee for the disapproval of the transfer. However, Mayor Davis testified that he was aware of all the meetings and discussion of this transfer; and his best recollection is that the only reason for the disapproval of the transfer was the hatred of some City Commissioners and Chief Johnson for Alphonse Lewis.

When the hearings for revocation culminated, Mayor Davis stated that he had not heard anything to warrant revocation and, therefore, voted against it. Again at that time, he was impressed with the obvious dislike of Mr. Lewis by some members of the City Commission and Chief Johnson.

Commissioner Barto, Chairman of the Safety Committee, recalled asking at one of the revocation hearings why the "yes" for recommendation on the 1800 form had been changed to "no", when no reasons were given. He never received an answer.

Mr. Barto also testified that Mrs. Patricia Ettress Bell and her attorney never made any claim against Mr. Lewis at any of the hearings. Mr. Barto was also present when the Safety Committee members talked to Mrs. Bell alone, out of the presence of her attorney, Mr. Dewey.

As far as the arrangement for taxes was concerned, Commissioner Barto stated that an escrow plan had been set up whereby the due taxes would be paid upon transfer. In fact, at one point Chairman Barto told the Safety Committee that all it had to do was to approve the transfer, subject to the payment of the taxes. He understood, at least, that if the transfer was approved, the taxes would be paid.

When asked if there was a fraction of the City Commission controlled by Commissioner Lamberts, Mr. Barto replied, "Sometimes I think so."

Commissioner Sypniewski testified that no reasons for disapproval were ever given to Mr. Lewis in a public hearing. All the alleged reasons were given at the meet-

ing of the Committee of the Whole, or in informal discussions among the various Commissioners. Great reliance was placed on what the Safety Committee reported concerning this matter, for they had been working on this matter for some ime. He commented that although Mr. Lewis had repeatedly asked for reasons, none were given to Mr. Lewis. He also recalled that Chief Johnson did not give any reasons until the October revocation meeting.

When Commissioner Sypniewski was asked if he had seen gambling on other licensed premises, he answered, "as a citizen, yes."

Mr. Vanden Berg was a member of the Safety Committee from May 1, 1962 through the revocation hearings. He replaced Mr. Sevensma. When he came on the Committee, he said he was aware from all the other members how this particular transfer was going. He said he felt a need for quick resolution to the proceedings; that certain information, as requested by Commissioner Lamberts, was needed from the LCC to bring an end to this lengthy hearing.

Commissioner Vanden Berg, who only attended two meetings of the Safety Committee at which the Barnett's Bar license transfer was discussed, testified that reasons were given to Mr. Lewis at the July 24 and other Safety Committee hearings for their disapproval. The court, however, finds contrariwise.

Then, he added that it was not normal for the Safety Committee to give the reasons because of possible embarrassment to the applicant. Mr. Vanden Berg testified that if Mr. Lewis had asked for the reasons before the disapproval, Mr. Vanden Berg would have asked him if he really wanted them, and then would have given them. This is clearly contradictory.

When Mr. Vanden Berg gave his own reasons for disapproval, he listed: (1) Mr. Lewis' plural relationship; (2) the conflict of interest; (3) a violation of the fiduciary position held by Mr. Lewis; (4) an infraction of the law had occurred at the Bar; and (5) taxes had not been paid.

These are set out only to show that his reasons conform conspicuously to Commissioner Sevensma's notes prepared specially for this trial, which were improperly used

by Commissioner Sevensma to refresh his recollection while he testified on these issues in court.

Mr. Vanden Berg stated, however, that he never inquired into the exact relationship Mr. Lewis had with Mrs. Bell as attorney; he did not know when Mr. Lewis had so served her, or how. Commissioner Vanden Berg never inquired whether the money owed to Mr. Lewis by Mrs. Bell was reasonable for his services performed. He stated that he had learned of the infraction through the newspapers — that someone had pleaded guilty in gambling charges at the Bar. He also testified that he did not know that Mrs. Bell had worked the day shift at the Bar and had access to the money taken in. He never inquired why Mrs. Bell did not pay the taxes.

Commissioner Vanden Berg also stated that at one time he heard Commissioner Lamberts say that Mr. Lewis would never have anything to do with this Bar. Commissioner Vanden Berg received his information from the newspapers, Commissioner Lamberts, and Chief Johnson.

Commissioner Sevensma was a member of the Safety Committee from 1960 to May of 1962. Being the only attorney on the Safety Committee, he was given the task of investigating the Kent County Circuit Court file when the first hearing was held on January 16, 1962.

Commissioner Sevensma refreshed his recollection on direct examination from notes which he especially prepared for use at the trial. When the court saw Mr. Sevensma making reference to yellow legal pad note papers, the court asked the witness to submit these notes to the court for examination.

The witness admitted that these notes had not been prepared at the time of the occurrence of the particular events in this case. The court then made the notes an exhibit in the case.

Direct use of such notes almost exclusively for the purpose of refreshing recollection is dangerous and improper. It subjects the witness' testimony to careful scrutiny. It casts a cloud of incredibility and insufficiency over Commissioner Sevensma's entire testimony. Parsons & De-

Costa v. Wilkinson, et al., 113 U.S. 656, 28 L. Ed. 1037, and the cases growing out of Parsons.

Insofar as other Commissioners' testimony conforms to the Sevensma testimony, it likewise casts a cloud over such other Commissioner witnesses' testimony.

The danger involved from such practice was particularly emphasized to the court when Commissioner Sevensma testified as to his examination of the bill of complaint in the Kent County Circuit Court action.

This testimony, his notes, and the reference to the bill of complaint in the Circuit Court action, convince this court that the witness' testimony reflected post-factum judgment and conclusions to any of the events about which he testified.

In regard to the money owed by Patricia Ettress Bell being equal to the debt claimed by Mr. Lewis, Commissioner Sevensma said that he never sought to find out if the LCC had investigated the financial arrangement for the transfer. He did know that this was within their usual jurisdiction. Commissioner Sevensma was aware that provisions had been made for the payment of the due taxes through an escrow agent.

Mr. Sevensma felt strongly about the nature of a liquor license; in his opinion, whenever there was any sign of gambling at a bar, the license should be revoked. His own knowledge of gambling in this case was from hearsay. He never read the pleadings or the record in the gambling cases; he did not know that there was a preliminary examination; he did not know the facts surrounding the arrest and subsequent plea of guilty by Wesley Calloway.

Although Commissioner Sevensma is an attorney and a former deputy and assistant prosecuting attorney, yet he was content to rely on rumor, hearsay, speculation, and the vindictive attitude of a fellow commissioner, as well as of the Chief of Police. By this reliance, Commissioner Sevensma would deprive Patricia Ettress Bell of the benefits she would receive as a transferor, and he would also deny Mr. Lewis and Dr. English a valuable Class C liquor license.

In effect, without knowledge of the facts, Commissioner Sevensma condemns Mr. Lewis for alleged condonation of unproven gambling offenses on the licensed premises.

Upon such shifting sands of flimsy evidence Commissioner Sevensma would impose the ultimate penalty of revocation of the Class C liquor license at Barnett's Bar.

When Commissioner Sevensma on cross-examination was informed of the facts in the alleged gambling cases, he stated that if he had known these facts, his judgment about the case would have been different.

Commissioner Jamo was elected in May of 1962. He was not a member of the Safety Committee, but attempted to keep in touch with the details of the Barnett's Bar license transfer. He first stated that the evidence of gambling in the Bar made the operation a very poor risk. His source of information on the gambling charge was Commissioner Lamberts, who told him that Wesley Calloway had been arrested for possession of gambling paraphernalia in the Bar. He did not know that all cases concerning violations in Barnett's Bar were dismissed.

Commissioner Jamo was not aware that the LCC's authorized May investigation was actually a reinvestigation instigated at the request of Chief Johnson. He had discussed this matter with Chief Johnson, but did not see the 1800 form before July 31. Commissioner Jamo acknowledged that the form 1800 in evidence is inconsistent.

Mr. Jamo said that the unpaid taxes were a big hurdle for him. He explained he never was advised that the taxes could be paid out of the purchase price, for example, or that money could be placed in escrow to pay the taxes contingent on the approval of the transfer.

Commissioner Jamo stressed that this city needs Mr. Lewis in his role as a negro attorney and not as operator of a bar, and that he should practice law and not run a bar. The court observes that if Mr. Lewis has the good character and integrity necessary to practice law, he certainly ought to possess the character and integrity to operate a licensed liquor establishment.

Chief Johnson testified at the November 30, 1962 show cause hearing and at the trial on the merits. There were

two outstanding features about his testimony at the November 30, 1962 hearing in Federal Court. First, he clearly answered that the only time reasons for disapproval were ever given by him at a public hearing at which Mr. Lewis was present, was at the October 24, 1962 revocation hearing.

At the trial of this case, Chief Johnson attempted to clarify his testimony which he gave in the Federal Court hearing on November 30, but this attempt only convinced the court that he was trying to escape the clear implications of his first testimony. His testimony during this trial is conspicuously contradictory and incredible in many respects.

Secondly, Chief Johnson's appearance on the stand at the first November 30, 1962 hearing convinced the court that he hated Mr. Lewis. He testified with great difficulty; he was quickly exasperated, and clipped off his answers. When extensive questions were asked by Mr. Lewis, the Chief grew redfaced and tightlipped; the blood vessels in his head bulged out.

By his exposure on the witness stand, Chief Johnson displayed explosive animosity and great hatred for Mr. Lewis. His testimony, plus that of the Trustee, Mr. Nichols,(5) convinced the court that there were probable violations of constitutionally protected rights and compelled the court to retain this action for a full hearing on the merits.

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(5) "Mr. Nichols: • • •

"Now, as to whether or not I would actually go in there and operate this bar under these present complicated situations and the personal animosities as I have seen them demonstrated in the City Council offices and the Safety Committee, I wouldn't want to operate this bar under any given set of circumstances.

"Q. (By the Court) What do you mean by the personal animosities of the City Safety Commission?

"A. Well, your Honor, I feel very definitely that there are very personal feelings in this case. I feel that there are people on the City Commission who are approaching this problem with an entirely closed mind; that they do not propose to listen or hear.

We have off the record approached members about this. I explained to them that my job as a trustee was to sell this property immediately. My counsel and I had a package worked out whereby this bar was sold for money, and we had

While Chief Johnson was on the stand, his testimony, demeanor and attitude impressed upon the court the conclusion that the Chief's actions in this case were motivated by malice.

Chief Johnson ordered the 1800 form changed from an affirmative recommendation for transfer to negative *after* the July 31 action of the Safety Committee. Thus, at the time of the resolution of disapproval, the police investigation form *recommended* transfer. The investigation had been completed by Officer Szumski; Chief Johnson disagreed with the results.

This is particularly important, since the minutes of the Safety Committee meeting of July 31 show that its disapproval was based on the recommendations of the police.

We must remember that the 1800 form was never made available to the Safety Committee before July 31. Therefore, we reasonably infer that the Safety Committee placed substantial reliance upon the personal recommendation of Chief Johnson — a recommendation rooted in hatred and motivated by malice.

When the Chief ordered the 1800 form changed after July 31 to coincide with his own recommendation, he neglected to see that the report was consistent. The report in its changed form states:

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(5) Continued—

an agreement of all parties, and I was assured that only over certain dead bodies would the transfer ever be permitted, and I think that that precludes any possibility of my operating this bar.

* * *

RE-EXAMINATION BY MR. LEWIS:

"Q. Who was this animosity directed to that you testified to, Mr. Nichols?

"A. Well, Mr. Lewis, very obviously, in my mind, it is you.

"Q. Now, isn't it true that if it could be worked out and you have been advised if it could be worked out so long as I have nothing to do with it, the bar could continue operating?

"A. I have heard that said publicly."

(Tr. November 30 hearing, pages 95-96.)

"From your observations or conversation with the above person are you of the opinion that he (she) is properly qualified to conduct such a business?
Yes [x] No [ ]

"Do you recommend granting this license — no . . If not, state reasons . . ."

Therefore, contrary to the directive of the LCC letter and the obvious demand of the 1800 form itself, no reasons were stated on the form why the transfer was not recommended.

The court noted the speed with which the police disposed of the Lewis investigation in 1961 — they received notice to investigate on June 2 and sent their reply back on July 11. That time, however, they had stated a reason for not recommending transfer: there was a gambling charge pending.

The second investigation by the Grand Rapids Police Department never did reach the Safety Committee. Form 1800 recommending approval of the transfer was completed by Officer Szumski on November 1, 1961. It was changed by order of the Chief some nine or ten months later. It was never sent to the LCC, although the LCC had requested its return with reasons.

Chief Johnson stated in his testimony that the regulations governing liquor licenses required cooperation with the police, and he felt that no attorney could fulfill this obligation. Such a regulation was never intended to force licensees to become subservient to any unreasonable and unconstitutional demands of the police.

It was pointed out that other attorneys were liecnsees in the City of Grand Rapids, and the Chief said he knew this. But no objection was ever made, nor could one reasoably be made, that these other attorneys because of their profession are unqualified to be licensees.

In fact, this position by the Chief supports the court's impression that part of the personal vendetta by him against Mr. Lewis resulted from Mr. Lewis' practice of his profession in trial work: in defending persons charged

with crimes; in particular, in Mr. Lewis' successful defense of the persons charged with violations of the gambling laws at Barnett's Bar; and in the successful defense of Mrs. Ettress before the Liquor Commission. Chief Johnson wanted to close Barnett's Bar, the lone negro-owned Class C liquor license in Grand Rapids.

It is common knowledge that any attorney who defends persons in criminal cases has many occasions to disagree with police officers. There is testimony that Mr. Lewis on occasion was exceedingly aggressive in his approach to such cases. Perhaps this is what the Chief meant by lack of "cooperation." Chief Johnson stated that he had discussed Mr. Lewis' trial techniques with Commissioner Lamberts many times.

From these many discussions and the evident close cooperation between Chief Johnson and Commissioner Lamberts, the court concludes that Chief Johnson and Commissioner Lamberts conspired as a team to revoke this license and to deny to Mr. Lewis his constitutionally protected rights.

Commissioner Lamberts testified longer than any other person at this trial, with the exception, perhaps, of Mr. Lewis. Generally, her testimony was evasive, insufficient, inconsistent, contradictory, and incredible. Her disregard for judicial process and constitutionally protected rights of others is incredulous and ruthless. The line of demarcation between fact and fiction in her testimony is very thin.

Her whole attitude toward this matter and toward judicial authority in general was clearly displayed during the examination by the attorney for the Trustee in Bankruptcy, Mr. DeGroot. In answer to a question concerning the position of the City Attorney on procedure for the revocation hearings, Mrs. Lamberts replied that the City Attorney only makes "suggestions" and that the Commission sets its own rules.

To emphasize the sassy tone of her voice, she punctuated her answer by sticking out her tongue at the attorney. Her facial grimaces had occurred before this, when she was on and off the stand. By "Oh's" and Ah's", she expressed visible approval or disapproval of the testimony of other

witnesses. The court had permitted Commissioner Lamberts to demonstrate graphically her attitude without reprimand until this time, since this was a trial without jury.

The court is also aware of one time in the course of this trial when Commissioner Lamberts chose to demonstrate her omniscient attitude by expostulating that a certain question "was not worthy of answer." With this in mind, the court will delineate some of her testimony.

During the course of this transfer, Commissioner Lamberts said she talked with Chief Johnson often, as well as with other members of the Grand Rapids police. She recognized that animosity existed between Chief Johnson and Mr. Lewis. She heard that Mr. Lewis' attitude toward the police was most disrespectful.

She claimed that her own dislike of Mr. Lewis arose at the April 17 Safety Committee meeting when Mr. Lewis allegedly called Chief Johnson a liar, or said Chief Johnson was lying. The only reasonable inference from Commissioner Lambert's testimony and attitude is that this was not the sole cause of her hatred for Mr. Lewis, but that something more was involved.

Her hatred for Mr. Lewis ante-dated April 17, 1962. She claims, however, part of her judgment against Mr. Lewis was based on what Chief Johnson told her.

It is apparent that Commissioner Lamberts and Chief Johnson pursued this matter together after April 17, 1962, and that the interests and prejudices of one became the interests and prejudices of the other.

Commissioner Lamberts admitted that the police investigation form 1800 was never presented to the Safety Committee before its decision on July 31. She also acknowledged that the answers on the 1800 form as it now stands are inconsistent.

This witness talked to other Commissioners outside the regular hearings about Mr. Lewis, and conveyed her dislike to them. Commissioners Lamberts and Vanden Berg recalled, as did Chief Johnson, that the Chief gave reasons for disapproval in public hearings before July 31. Commissioner Lamberts did attempt to qualify her recollection by saying that everything that was discussed at the hear-

ings was a reason for disapproval. This is hardly an answer to the question: "Why was the transfer disapproved at that time?"

Commissioner Lamberts refused to accept the information conveyed by the LCC to the Grand Rapids police on April 6 as an answer to the Safety Committee's questions, although Commissioner Barto, as Chairman, said that the letter did in substance answer their questions.

When the April 12 letter from Mr Forell concerning the federal stop order was introduced, Commissioner Lamberts phoned Mr. Forell to check the tax position, because it appeared to be inconsistent with the April 6 letter which stated that the tax problem had been resolved. She said she wanted to find out if Mr. Lewis had lied to the LCC about the taxes.

Commissioner Lamberts admitted that the Committee discussed an escrow agreement arrangement for the payment of taxes at the time of the transfer.

Commissioner Lamberts stated that the Safety Committee requested the City Attorney to write the LCC concerning the violation of Rule 17 and Rule 31. She testified that "we wanted to close the bar."

In regard to the gambling charges against the Bar, Commissioner Lamberts said that Chief Johnson told her that a numbers operation was carried on at Barnett's Bar. She said she knew the court dismissed four of the six charged in the gambling, and that the prosecutor had petitioned for an order nolle prosequi for the other two. She maintained, however, that does not mean that gambling does not occur there. She stated that she chose to believe what Chief Johnson told her about the gambling.

Commissioner Lamberts agreed that neither Patricia Ettress Bell nor any attorney representing her had ever made a claim that Mr. Lewis had acted improperly in regard to the proposed transfer. Commissioner Lamberts herself never accused Mr. Lewis of faulty action at any Safety Committee or City Commission meeting at which Mr. Lewis was present.

The attorney for the Trustee pointed out that in the resolution calling for a show cause hearing on revocation,

the Safety Committee stated that the Trustee was exerting no control over the license; that such lack of control on the part of the Trustee was a reason for the revocation. Commissioner Lamberts explained that by "no control" she believed the Trustee was not cooperating with the Safety Committee to the extent he should have done so.

At this time Commissioner Lamberts knew that the Trustee had tried to take possession of the license but that the order of the Referee had stayed any exertion of title until the petition for review had been heard. She insisted, however, that Mr. Lewis and the Trustee voluntarily place the license in escrow or have it revoked.

On April 29, 1963, the court granted plaintiff's petition for renewal of the license in the name of Patricia Ettress under the March 20, 1962 agreement and the power of attorney to Mr. Lewis. Pursuant to this court's order, the LCC renewed the license pending the outcome of this case.

On May 22, 1963, upon stipulation of the parties, an order was filed dismissing the United States as a party defendant.

A jurisdictional question must first be resolved: Does this court have jurisdiction to review the action of the Chief of Police, the Safety Committee, and the City Commission of Grand Rapids on the question of transfer and revocation of the license at Barnett's Bar?

The Michigan Constitution provides in Article XVI, §11:

> "The Legislature may by law establish a liquor control commission, who, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sales thereof: . . ."

In accordance with this power, the legislature passed the Michigan Liquor Control Act, Public Act 8, 1933 (Ex. Sess.), MSA 18.791 to 18.1029, and subsequent amendments. The state agency given the power to regulate and control

the liquor business was the Liquor Control Commission. MSA 18.972(6).

Michigan also has an Administrative Code, MSA 3.560 (7)-3.560(18), and an Administrative Procedure Act MSA 3.560(21.1)-3.560(21.10). The latter describes the rights of the public in relation to procedure before state administrative agencies. The Administrative Procedure Act requires each agency to adopt rules governing formal and informal procedures relating to contested cases. Op. Atty. Gen., Feb. 27, 1953, No. 1595.

The Michigan Liquor Control Act delegates certain functions concerning the regulation of liquor to local units of government. The provision under which the Safety Committee of the City Commission of Grand Rapids necessarily acted in this case is MSA 18.988, which provides in part:

> ". . . Licenses may be transferred with the consent of the commission (Liquor Control Commission) . . . All applications for licenses to sell beer and wine or spirits for consumption on the premises, except in counties of 1,000,000 population or over, shall be approved by the local legislative body in which said applicant's place of business is located before being granted a license by the commission . . ."

The local legislative body, the City Commission, is an arm of the state's administrative agency whenever it functions under this provision. Since an application for transfer is within the language of the above statute, it must be approved by the local body *before* the Liquor Control Commission can grant the license. The language is mandatory; a license cannot be granted without local approval.

Disapproval is equivalent to *denial* of a transfer because the local agency's approval is a condition precedent to a grant of transfer by the LCC.

The Legislature formulated rules for review of actions of the Liquor Commission. See MSA 18.991. This is in

keeping with the direction of the Administrative Procedures Act, which states:

> "Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof under this act; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief or trial de novo, provided by law . . ." MSA 3.560(21.8).

A contested case is defined as follows:

> "'Contested case' means a proceeding before an agency in which the legal rights, duties or privileges of a specific party or specific parties are required by law or constitutional right to be determined after an opportunity for an agency hearing." MSA 3.560(21.1)(3).

The parent administrative agency is by these laws required to proceed in a particular way, out of recognition for basic concepts of procedural fair play and due process. It is only reasonable to conclude that an agency subordinate to the parent agency, whose action controls in a denial, must be guided by similar concepts of fair play and due process.

Rights of persons appearing before a local governing body must be properly safeguarded and the traditional check is judicial review. Constitutionally protected personal rights must be secured to persons appearing before local administrative agencies.

The statute declares the local administrative agency "shall approve" before the Commission can grant a license. "Approval" connotes discretion. Thus, the local agency may approve or disapprove according to the facts of the situation. This discretionary action may be challenged by judicial review as arbitrary, unreasonable, or unconstitutional.

The proposition is stated in 2 Am. Jur. 2d, Sec. 650, as follows:

> "ARBITRARY, CAPRICIOUS, OR UNREASONABLE ACTION: ABUSE OF DISCRETION.
>
> Since such action is not in accordance with law, is in excess of authority, and presents a judicial question or a question of law for the court, a court on review of action of an administrative agency, under express provisions of some statutes but even in the absence of statutes providing for judicial review or relief and in the face of statutes purporting to preclude judicial review, this being a matter of constitutional right in some instances, will pass on, and in a proper case grant relief from or set aside, agency action, findings, and conclusions which are arbitrary, capricious, or both or either, unreasonable, or arbitrary or unreasonable, or an abuse of power of discretion ....
>
> "Sometimes the courts use other terms to express the type of illegal action which is subject to review or reversal, namely, action which is unjust, discriminatory, or oppressive." 2 Am. Jur. 2d, §650.

The Michigan Supreme Court recognized this fundamental principle early in a well written opinion by Justice Campbell:

> "It is undoubtedly true that no court can review the lawful discretion of any body that is not a court . . . But it is equally true that private rights cannot be subject by legislative, executive, or any other authority, to the unregulated discretion of any one. Legal rights can only be divested by such measures as are classed under the *law of the land as due process of law . . . But in a constitutional government, the action of all persons, official or private, which is in violation of constitutional rights, is simply null and void, and usually needs no reversal.*" Dullam v. Willson, 19 Mich. 112, 120 (1884). (Emphasis supplied.)

This is the essence of written limitations of constitutional government.

Justice Campbell declared the same proposition in People ex rel Robison v. Miher, 37 Mich. 21 (1888).

In Sherlock v. Stuart, 55 N.W. 845 (1893), plaintiff sought mandamus against defendant Mayor of Grand Rapids. A city ordinance had given discretion to the City Common Council and the Mayor in determining the proper locations for licensed liquor establishments. The court found the ordinance clearly authorized under existing law and stated:

> "When the mayor and council have in good faith exercised the discretion conferred upon them by the law, courts cannot review it. There is nothing in this case showing any abuse of discretion, or the arbitrary exercise of power." At page 847.

Glicker v. Michigan Liquor Control Commission, 160 F. 2d 96 (CCA 6) is the leading and controlling case in this Circuit. In that case the district court dismissed plaintiff's complaint on defendant's motion. The Circuit Court of Appeals reversed.

Plaintiff in Glicker was the owner of a Class C license The license was revoked for what plaintiff claimed were arbitrary and discriminatory reasons. Plaintiff asked for an order directing the defendant LCC to renew her license.

The Circuit Court of Appeals first agreed with the district court that the plaintiff had no cause of action under that portion of the Fourteenth Amendment which prohibits a state from enforcing any law which abridges the privileges or immunities of citizens of the United States. Judge Miller, speaking for the court, said:

> "The right to a license to sell intoxicating liquor is not a natural or fundamental right, nor a privilege incident to national citizenship. The regulation of the liquor traffic in any state is exclusively under the police power of that particular state. (Omitting cases cited.) . . Accordingly, appellant's right to a license to sell liquor in Michigan is not protected by the privi-

leges and immunities clause of the Fourteenth Amendment." At page 98.

Judge Miller, however, clearly declared that the appellant had a proper complaint under the equal protection clause of the Fourteenth Amendment. He said:

> "The *equal protection* clause of the Fourteenth Amendment *is a right in itself,* separate and independent from the rights protected by the privileges and immunities clause of the Fourteenth Amendment . . .
>
> "In Hartford Steam Boiler Inspection and Insurance Company v. Harrison, 301 U.S. 459, 57 S.Ct. 838, 839, 81 L. Ed. 1223, the Court pointed out that while the *Fourteenth Amendment* allows reasonable classification of persons, yet it *forbids unreasonable or arbitrary classification or treatment,* and wrote . . . 'it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances . . . and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation.' In Sunday Lake Iron Company v. Township of Wakefield, 247 U.S. 350, 38 S. Ct. 495, 62 L. Ed. 1154, the Court said . . . 'The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against *intentional and arbitrary discrimination* (U.S. Supreme Court's emphasis), whether occasioned by express terms of a statute *or by its improper execution through duly constituted agents.*' . . . Numerous other cases fully sustain the rule that the constitutional rights provided by the equal protection clause of the Fourteenth Amendment to a person within the state *are violated by intentional discriminatory* action against him on the part of the State, acting either *through its legislative body or by the administrative action of its officials,* and that remedial action is provided therefor

by Section 1979, Revised Statutes." Omitting cases cited. At page 99-100. (Emphasis supplied.)

The court then went on to recognize what the duties of the court were in regard to the action of the state agency.

> "While the Federal Government does not have the right to regulate such matters, which are exclusively under the control and regulation of the state, yet it does have the right, by virtue of the Fourteenth Amendment, to prevent such regulation from being arbitrary or discriminatory . . . The rule is equally as applicable where the business or occupation being regulated is not a franchise or property right, *but is merely a privilege granted or withheld by the state at its pleasure.*" (Emphasis supplied.) At page 100.

Recognizing that the pleadings in the case admitted arbitrary and discriminatory action, the Circuit Court held that the complaint was sufficient and the district court should not have granted the motion to dismiss.

Plaintiff Lewis in this case has alleged in his complaint that the City Commission and the Superintendent of Police of Grand Rapids intentionally discriminated against plaintiff in disapproving the transfer of the license to plaintiff.

The first issue which the court must decide on review is whether the Safety Committee of the City Commission and Superintendent Johnson acted in an arbitrary, discriminatory or unreasonable manner in disapproving this transfer.

From the facts and evidence produced at the trial of this case, the court is compelled to find that the Safety Committee and Chief Johnson intentionally discriminated against plainiff Lewis.

Chief Johnson and Grand Rapids Police officers under his direction deliberately delayed processing the required LCC form 1800 and refused to state reasons for their intentions to recommend denial of the transfer. They acted with deliberate delay instead of due diligence. This delay is discrimination in disguise.

In review of his testimony under the facts of this case, this court has found the controlling motives of Chief Johnson's and Commissioner Lamberts' actions were hate and malice.

It is clear that local administrative agencies under the Michigan Liquor Control Act heavily rely upon the recommendations of staff police officers. In the present instance, the Safety Committee and the City Commission relied to a controlling degree upon the alleged facts received from Chief Johnson and Commissioner Lamberts, as well as upon their recommendations.

In the April 17 Safety Committee meeting, Commissioner Lamberts was joined by Commissioner Sevensma in the intentional delay advocated by Chief Johnson. *The intentions of Commissioners Lamberts, Sevensma, Jamo, and Chief Johnson came into clear evidential focus from April of 1962 through and including* the actual trial of this case.

In April the application for transfer was in a posture for completion. The Lewis-Patricia Ettress Bell difficulties were resolved. It is important to note that Mr. Lewis became a prospective transferee purchaser only after attempts to sell the license to others failed. Unpaid taxes could be resolved through escrow, and gambling charges had been dismissed . The LCC investigation was completed, and approval was indicated.

But for the unconstitutional and capricious conduct of certain city commissioners and Chief Johnson, this Barnett's Bar license would have been transferred within a reasonable time after April 17, 1962.

Thereafter, Chief Johnson *instigated* a new LCC investigation solely for the purpose of delay. This and all of the preceding activities were discriminatory. They were intended to deny the transfer of the license to Mr. Lewis and Dr. English without declaring legitimate reasons, or any reasons at all. This would be to the detriment of not only Mr. Lewis and Dr. English, but also to the detriment of Patricia Ettress Bell.

Commissioner Lamberts claimed Mr. Lewis was disrespectful toward police officers in court. The testimony

of the prosecutor, Mr. Richard Loughrin, is to the contrary. Commissioner Lamberts never saw Mr. Lewis try a case until this transfer issue came before the Safety Committee. Then she attended court trials just to watch Mr. Lewis in action as an attorney.

She disliked his insistence upon due process, open hearings, confrontation of witnesses, constitutional rights, declarations of reasons for delay by Chief Johnson and the Police Department, and reasons for denial of the transfer by the Safety Committee and the City Commission. Her dislike for Mr. Lewis caused her to pursue every channel of authority conceivable to her to defeat transfer and to close Barnett's Bar. When she phoned the LCC she misrepresented certain important facts when she told them there was going to be a grand jury investigation of this transaction.

She went so far as to seek an investigation by a school official of Mr. Lewis' wife, a school teacher, when Mrs. Lamberts heard that Mrs. Lewis had claimed in the presence of her students that this transfer had been disapproved for discriminatory reasons.

There are only three liquor establishments in the City of Grand Rapids owned by negroes: the Lamar hotel license, a club license; the Crispus Attucks Post of the American Legion, available for service to members only; and Barnett's Bar.

All three of these liquor establishments are located in Commissioner Lamberts' ward. She wanted Barnett's Bar closed. She intended to eliminate the only Class C liquor license owned by a negro in the City of Grand Rapids, a city of over 200,000 population.

She sent a telegram to Attorney General Frank Kelley when it appeared that the Referee in Bankruptcy intended to enjoin city officials from communicating to the LCC their attempted revocation action. She used this channel as a means to get the information to the LCC, just as she used the channel of the legal adviser to Governor to force indirectly the LCC to do the bidding of the City Commission of Grand Rapids, which was under her dominating control insofar as this transfer was concerned.

Commissioner Lamberts had obtained a position of power and substantial influence in the City Commission. Her rise to Chairman of the Safety Committee and President of the City Commission, and the evident voting bloc which she had acquired in the City Commission, gave her substantial power, which she wielded arbitrarily, capriciously, and unreasonably in this instant case.

The recommendations of Chief Johnson and Commissioner Lamberts to the Safety Committee and to the City Commission withheld facts and presented distorted facts which were corrupted by malice and hatred. The facts presented in this manner thus permeated the entire action of the Safety Committee and the City Commission in each of its votes on the questions presented by the problems of the application for transfer involved in this case.

Commissioner Barto neglected to pursue his previously expressed dissatisfaction with the Safety Committee's and the Commissioners' denial of due process, as well as with their disapproval of the transfer subject to escrowing the taxes. He also neglected to pursue his previously expressed dissatisfaction with the change made in the Form 1800 from "Yes" to "No," and with the failure of the Police Department to state reasons for this charge.

Commissioner Sypniewski went along indifferently with the other Commissioners who were following the leadership of Commissioner Lamberts and of Chief Johnson. The tide of resentment engendered against Barnett's Bar and Alphonse Lewis by Chief Johnson and Commissioners Lamberts, Jamo, Sevensma and Vanden Berg was of sufficient momentum to sweep Commissioners Barto and Sypniewski behind the leadership of Commissioner Lamberts and Chief Johnson.

From the begining to the end of the proceedings before the Safety Committee and the City Commission, all of the Commissioners, except the Mayor, participated in a conspiracy of silence.

Commissioner Vanden Berg testified that this silence was to insure Mr. Lewis freedom from embarrassment. Such testimony can be accorded little weight in light of plaintiff Lewis' insistence not on secrecy but on open hearings;

not on silence but on testimony of live witnesses; not on hiding facts involved in this case but in revealing facts. He was willing to submit himself to cross-examination, but he also wished to cross-examine those who were uttering whispered innuendoes and calumny behind his back.

He called for due process and constitutional rights. Chief Johnson and Commissioners Lamberts, Jamo, Sevensma, and Vanden Berg denied due process and constitutional rights.

Historically, secrecy frequently has been used to intimidate individuals and to destroy careers and reputations in civil society. In the present case secrecy and silence as to the real reasons for denying the transfer of the license created distorted images in the public means of mass communication. Mr. Lewis, Barnett's Bar, and all who were associated with it, were made to appear to represent all that was undesirable in taverns and licensed liquor establishments, and especially, with varying inflections of overtone, a negro bar.

This is not secrecy of freedom but secrecy of tyranny. It is a secrecy which destroys rather than protects human rights.

This court finds as a matter of fact that the Safety Committee, the City Commission, and the Chief of Police studiously avoided stating reasons in public session in the presence of Mr. Lewis, Dr. English, or Patricia Ettress Bell for the unreasonable and unwarranted delay in the processing of form 1800 and for failure to approve transfer of the license.

This failure casts a shadow of doubt over the legitimacy and the veracity of their later declarad reasons, and creates a presumption against the integrity of the state post factum reasons.

To further this secrecy, they sought out the advise of the City Attorney, thus conspiring together "under the color of law" to deny both to plaintiff Lewis and to Patricia Ettress Bell due process and equal protection of the law. In this regard they violated the Federal Civil Rights Act, Title 42 USC §§ 1981, 1982 and 1983.

It is interesting to note that the Commissioners picked and chose the advice of the City Attorney. They followed him on his advice in regard to secrecy, but they disregarded his advice on the question of the legality of a non-resident owner of a tavern license, and on the question of the legality of the bar being open from twelve o'clock to two o'clock on Monday mornings.

It is important to bear in mind that insofar as the negro population of the City of Grand Rapids is concerned, it comprises about 7% of the population. In Commissioners Lamberts' and Jamo's political calculation this was a negligible force which could be disregarded. Their activities in the case here at issue were before Birmingham.

The Court's discussion of the gambling charges need not be repeated here. The action of the city police in this regard, however, constituted a discriminatory enforcement of the gambling laws against a licensed liquor establishment.

Commissioner Sypniewski testified that he, as a citizen, had observed violations of the gambling laws in other licensed premises in the City of Grand Rapids. Yet, the only instance in which an attempted revocation or denial of a transfer of a license via alleged gambling-law violations in at least sixteen years is Barnett's Bar. Chief Johnson could testify to no other raid on a licensed establishment in his years of experience on the police force.

The net effect is that the action of Chief Johnson, of the Safety Committee, and of the City Commission in relation to this transaction has been arbitrary, capricious, unreasonable, and unconstitutional. It was discriminatory both racially and personally. There existed in fact a conspiracy on the part of Chief Johnson and Commissioners Lamberts, Sevensma, and Jamo to defeat and deny the transfer, and ultimately to revoke the only negro-owned Class C liquor license in a city of over 200,000 population.

The instant case is one of invidious discrimination. See Skinner v. Oklahoma, 316 U.S. 535-547, 86 L.1d. 1655, at page 1660; Braunfeld v. Brown, 366 U.S. 599, 6 L.Ed. 2d 563, 81 S.Ct. 1144; Baker v. Carr, 369 U.S. 186, 7 L.Ed. 2d 663, 8 S.Ct. 691; Sanders v. Gray, 203 F.Supp. 158,

reversed ..... U.S. ....., 9 L.Ed. 2d 821 (1963); and Sherbert v. Vener, ... U.S. ....., 10 L.Ed. 2d 965.

Since the only reason given at a public hearing in the presence of Mr. Lewis, Dr. English, or Patricia Ettress Bell at any time up to and including the date of denial of the transfer by the City Commission on July 31, was failure to pay taxes as evidenced by Chief Johnson's reference to the Forell letter and recommendations of the police department, the court ruled as inadmissible in the principal case the post factum reasons given by the Commissioners in their testimony.

Since, however, these reasons were made a part of a segregated record and since they may be considered only insofar as they relate to the segregated record, the court has commented upon these facts merely to disclose the transparency of these reasons and to add substance to the finding of the court that Chief Johnson, the Safety Committee, and the City Commission acted arbitrarily. These reasons, even if admitted as evidence, are a facade for the real reasons behind the action of the Safety Committee and the personal and racial discrimination of Chief Johnson.

It is worthy of note that Barnett's Bar and the transfer of the license to Alphonse Lewis became a cause celebre in the City of Grand Rapids. Mass means of communication — radio, TV and newspapers — covered the sessions of the Safety Committee. Stories appeared frequently in the news media so extensively — and it was the purpose of Chief Johnson and Commissioner Lamberts to cause this result — that Barnett's Bar became synonymous with all that is undesirable in liquor establishments, and especially in a negro-owned-operated liquor establishment. Barnett's Bar and Alphonse Lewis as a consequence are unpopular in this community.

It is not unreasonable to conclude that the impressions thus created in the City of Grand Rapids and its environs of Barnett's Bar, of Alphonse Lewis, and of Patricia Ettress Bell, are such that if a popular vote were held on the question, "Shall Barnett's Bar license be revoked?" the vote would be overwhelmingly in the affirmative.

Unbridled discretion in public authorities lends itself to selective enforcement against unpopular causes.

The court cannot close its eyes to the fact that militant demands of the negroes have engendered unpopularity and resistance by certain officials. Alphonse Lewis was militant in his insistence upon constitutional rights. The militancy was vigorously resented. In such circumstances, discriminatory action may easily become the fashion of operation.

Unbridled administrative acts may well freeze out the existence of all activities on behalf of the social and civil rights of negroes. NAACP v. Button, ... U.S. ....., 9 L.Ed. 2d 405.

The City Commission claims that its action on the applications for transfer of the liquor license is a privileged exercise of police power. It is their contention that they may deny such applications without stating reasons for such denial.

The police power of the state or any of its agencies is not a sanctuary from which constitutionally protected rights of citizens may be violated with impunity.

The police power of the state is not a license to ignore the constitutionally protected rights of equal protection of the law, of equal enforcement of the law, and of due process of law.

What Judge Miller said (at page 100) in the Glicker case may be paraphrased: It is well settled that under the decisions of the United States Supreme Court a state police regulation is, like any other law, subject to the equal protection clause of the Fourteenth Amendment.

The City may not under the guise of protection of the health and welfare of the city, ignore these fundamental, constitutionally protected rights.

While it would be sufficient for this court to rest its opinion on the finding of denial of equal protection of the law, and thus, a violation of a constitutionally protected right of the Fourteenth Amendment, the court is compelled to further hold that the method of disapproval of the transfer was a denial of due process.

The logic of equal protection of the law in the instant case compels the requirement of fair procedural practice.

The very logic of the constitutional doctrine of equal protection under the law in cases of this kind compels conclusions that the aggrieved party in a contested case must be guaranteed procedural due process of law. This is an ancient doctrine, older than the writings of Henry Bracton, Lord Mansfield, or Blackstone.

It is first difficult to find the denial of one right here without the denial of the other because of the circumstances. In Traux v. Corrigan, 257 U.S. 312, 66 L.Ed. 254. (1921), plaintiff claimed that a certain statute denied him equal protection of the laws and violated due process. Chief Justice Taft discussed the equal protection clause and said:

> "The clause is associated in the Amendment with the due process clause, and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not conterminous." At pages 331, 332.

The course of decisional law and the constitutional history of the Fourteenth Amendment demonstrate the verity of this proposition.

We recognize that the Michigan Supreme Court and the courts of the other states have held consistently that the due process clause of the United States Constitution does not apply to matters concerning liquor licenses.

Various reasons for this position have been given. Licensees are said to have no vested interest in their license. People v. Schafran, 134 N.W. 29 (1912); Case v. Liquor Control Commission, 314 Mich. 632, 23 N.W. 2d 109; Fitzpatric v. Liquor Control Commission, 316 Mich. 83, 25 N.W. 2d 118, or the court holds that a license is merely a "privilege" and not property. Johnson v. Liquor Control Commission, 266 Mich. 682, 254 N.W. 557. And the Michigan courts have flatly stated that the exercise of the state's power in regard to liquor licenses is not affected by the Fourteenth Amendment. People v. Wheeler,

185 Mich. 164, 151 N.W. 710; Gamble v. Liquor Control Commission, 323 Mich. 576, 36 N.W. 2d 297.

The recent trend in the area of due process convinces this court that technical classification of rights realting to licenses is not an answer to the broad protection intended by the drafters of the Constitution. Some courts have squarely met this problem by saying:

> " 'State law,' the court explained (referring to Morgan v. Commissioner, 309 U.S. 78, 84 L.Ed. 585) 'creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed. Our duty is to ascertain the meaning of the words used to specify the thing taxed. If it is found in a given case that an interest or right created by local law as the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law'." Fidelity and Deposit Company of Maryland v. New York City Housing Authority, 241 F. 2d 142 (CCA 2, 1957).

See also In re Halprin, 280 F. 2d 407 (CCA 3, 1960).

The Federal Constitution, as interpreted by the United States Supreme Court, designates the rights which shall be protected. It is the duty of this court to determine whether the right here involved was intended to be protected.

The United States Supreme Court has had a recent opportunity to commit on this issue. Sherbert v. Vener, supra. Plaintiff in that case filed a claim for unemployment benefits since she could not find employment due to her refusal to work on Saturdays according to her religious convictions. The unemployment statute provided that the claimant must be available for work and must accept work offered except for good cause. The employment commission found that plaintiff's restriction upon her availability for Saturday work brought her within the disqualifying provision for failing to accept, without good cause, available work.

Plaintiff claimed that this disqualifying provision worked to deny her freedom to exercise her religion secured by the First and Fourteenth Amendments. In regard to the defense of this claim, Justice Brennan, writing for the majority, stated:

> "Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege'. *It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of (sic) or placing of conditions upon a benefit or privilege.*
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> • • •
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> "For example, in Flemming v. Nestor, 363 U.S. 603, 611, 4 L. Ed. 2d 1435, 1444, 80 S. Ct. 1367, *the Court recognized with respect to Federal Social Security benefits that '(t)he interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause.''* (Emphasis supplied.) (At page 971.)

This case involves a transfer proceeding, concerning the license held by the transferor — worth at least $18,000 — and a transferee desirous of pursuing this lawful occupation, and willing to pay for the license. Certainly we are speaking in matters of substantial substance. On the one hand we are speaking about a license, called a privilege only; but it has an acknowledged dollar value of $18,000. On the other hand we are speaking about the liberty and freedom of a citizen to pursue a lawful, though regulated, occupation.

The sale by one party of the use of this license can under certain circumstances be imminent. In this case the transferor was in financial difficulty. The settlement obtained in the Kent County Circuit Court case had in mind avoidance of bankruptcy by the transferor.

The purchase by the other party also carried grave implications. Part of the purchase price involved money owed by the transferor to the transferee — and the only asset of any value of the transferor was the liquor license. To destroy that license was in effect to destroy the debt.

To deny the transfer without due process, on the ground that a privilege only, and not property is in issue, is to close the eyes of justice to realities. Other courts have overcome this court-made hurdle.

The District Court in Midwest Beverage Co., Inc., v. Gates, 61 F. Supp. 688 (N.W. Ind.) (1945), went so far as to call a liquor license property. Even when faced with a state statute to the effect that a license was not a property right, the court stated:

> "*While a permit or license as such may not be property the use and enjoyment of it may give to its possessor something that is valuable and which has all the qualities of property.* • • • On the other hand *the use of the permit, once granted, has the elements of property irrespective of what the Legislature may declare about the permit itself, and except* for the omnipresent and unlimited power of the state to revoke or modify the terms of the permit in the interest of the public welfare, the use of such permit, if not *the permit itself,* is *property within the meaning of the due process clause of the Federal Constitution.*" At page 691. (Emphasis supplied.)

The New Jersey Supreme Court in a very recent case, The Boss Co., Inc. v. Atlantic City Board of Commissioners, 32 LW 2052, ... A. 2d ....., decided July 1, 1963, held that for federal tax liens, a liquor license was "property". The court is quoted as saying:

> "This *license has value* — not merely the personal value of the licensee that inheres in the right to engage in the business of selling intoxicating liquors, *but also the monetary value that arises from the power possessed by the licensee to substitute, with the municipal consent, some other person in his place as li-*

> *censee. * * *Thus, the liquor license is a legal interest in the nature of an economic asset, created and protected by statute,* and because it has monetary value and is transferable, either by consent of the licensee or by operation of law, * * * *it possesses the qualities of property.*'' 32 LW 2052 (Emphasis supplied.)

So long as it is legal to engage in licensed liquor traffic, and, so long as such licenses have a substantial monetary value, their transfer cannot be denied without due process of law.

It must be remembered also that the due process clause demands that no state shall deprive any person of his "liberty" without due process. The United States Supreme Court, as quoted by the Michigan Supreme Court, said long ago that:

> "'Liberty is something more than mere freedom from physical restraint. *It means a freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and to give them their highest enjoyment'.*'' People ex rel Kuhn v. Common Council, 70 Mich. 534, 38 N.W. 470 (1880), quoting from Justices Field and Strong in Munn v. Illinois, 94 U.S. 113, 142, 24 L. Ed. 77. (Emphasis supplied.)

Liberty includes the right to pursue a lawful occupation. To prevent this without due process is to violate the Fourteenth Amendment to the United States Constitution.

The right to liberty inheres in the very nature of man; it is superior to the right to property, which is a derivative right.

As recently as May 13, 1963, the Supreme Court has ruled on this important due process issue. In Willner v. Committee on Character and Fitness, ... U.S. ....., 10 L.

Ed. 2d 224, plaintiff was denied admission to the New York Bar. After a complex procedural process, and a ruling by the highest New York court, the Supreme Court granted certiorari to determine whether or not appellant had been denied due process of law.

The Court of Appeals of New York had ruled that appellant was not denied due process.

The Supreme Court stated in its opinion through Justice Douglas:

> "The issue presented is justiciable. 'A claim of present right to admission to the bar of a state and a denial of that right is a controversy.' Re Summers, 325 U.S. 561, 568. * * * Moreover, the requirements of procedural due process must be met before a state can exclude a person from practicing law. 'A state cannot exclude a person from the practice of law *or from any other occupation* in a manner or for reasons that contravene the Due Process or Equal protection Clauses of the Fourteenth Amendment.' Schware v. Board of Bar Examiners, 353 U.S. 232, 238-239. * * * As the Court said in Ex parte Garland, 4 Wall. 333, 379, * * * the right is not 'a matter of grace and favor'.
>
> "We are not here concerned with grounds which justify denial of a license to practice law, but only with what procedural due process requires if the license is to be withheld. This is the problem which Chief Justice Taft adverted to in Goldsmith v. Board of Tax Appeals, 270 U.S. 117, * * * involving an application of a certified public accountant to practice before the Board of Tax Appeals. Chief Justice Taft writing for the Court said:
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> > 'We think that the petitioner having shown by his application that, being a citizen of the United States and a certified public accountant under the laws of a State, he was within the class of those entitled to be admitted to practice under the Board's rules, he should not have been re-

> jected upon charges of his unfitness without giving him an opportunity by notice for hearing and answer. The rules adopted by the Board provide that "the Board may in its discretion deny admission, suspend or disbar any person." But this must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process.' " Id at p. 123, at page 229. (Emphasis supplied.)

It was claimed by the defendant that the petitioner was rejected by the Board on the basis of his own statements to the Committee. The Supreme Court remarked:

> "It does not appear from the record that either the Committee or the Appellate Division, at any stage of these proceedings, ever apprised petitioner of its reasons for failing to be convinced of his good character. Petitioner was clearly entitled to notice of and a hearing on the grounds for his rejection either before the Committee or before the Appellate Division. * * * There seems no question but that petitioner was apprised of the matters the Committee was considering.
>
> 'But a "full hearing" — a fair and open hearing — requires more than that * * * Those who are brought into contest with * * * Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.' Morgan v. United States, 304 U.S. 1, 18-19. * * *" At page 230.

Most City Commissioners in this case based their action on hearsay complaints against Mr. Lewis. Due process required that Mr. Lewis' right of confrontation be protected. Denial of the right of confrontation violated due

process as set forth in the Fourteenth Amendment. Willner, supra, page 230-231.

The Court concluded by holding:

> "* * * that petitioner was denied procedural due process when he was denied admission to the Bar by the Appellate Division without a hearing on the charges filed against him before either the Committee or the Appellate Division." At page 231.

Although Mr. Lewis insisted upon due process, confrontation and a declaration of reasons, Mr. Lewis was never informed of the specific reasons for the disapproval and denial of the transfer of the liquor license to himself and Dr. English. They were never given an opportunity to formally challenge the ex post factum purported reasons. For these reasons alone, Mr. Lewis was denied procedural due process.

Justice Goldberg, concurring in the Willner case, supra, stated at page 233:

> *"Moreover, at no point are we or the petitioner specifically advised by any finding of the committee or of the state courts as to the precise basis of denial to him of either his original or renewed applications for admission or his requests for reconsideration thereof."* (Emphasis supplied.)

Whenever an aggrieved person demands a hearing on the denial of an application for a transfer, he must be accorded procedural due process. Dation v. Ford Motor Co., 314 Mich. 152, 22 N.W. 2d 252; Napuche v. Liquor Control Commission, 336 Mich. 398, 58 N.W. 118; Morgan v. U.S., 298 U.S. 468, 80 L. Ed. 1288; Willner v. Committee on Character and Fitness, supra.

The action of the Safety Committee and the City Commission on July 31, 1962 denying the transfer of the license from Patricia Ettress Bell to Alphonse Lewis and Dr. English is void.

The license continued to exist subject to the pending application for transfer to Mr. Lewis and Dr. English. By

reason of the unconstitutional action of the City Commission and the Safety Committee, Mr. Lewis continues to operate the Bar to date under the March 20, 1962 agreement and the power of attorney.

On September 10, 1962, Patricia Ettress Bell, the licensee, filed a voluntary petition in bankruptcy.

On October 15, 1962, Mr. Lewis and Dr. English were ordered to show cause why the Trustee in Bankruptcy, Mr. Nichols, should not be declared the owner of the license. A hearing was held and on November 1, 1962, the Referee entered an order containing findings of fact and conclusions of law to the effect that the Trustee was the owner of the liquor license.

Mr. Lewis filed on November 7, 1962, a petition for review of this order. The petition is presently before the court by agreement of the Trustee and Mr. Lewis, entered into at a conference with the Court on August 5, 1963.

The findings of the Referee necessarily included a finding that the proposed transfer of the license to Mr. Lewis and Dr. English had been denied by the disapproval of the local legislative body. The present finding by this court that the action of the body was void does not change the status of the license ownership.

At all times before disapproval of the transfer and bankruptcy, Patricia Ettress Bell was the named licensee. True, Mr. Lewis had a substantial financial interest in the Bar, and therefore, in the license. Monies were expended by him in procuring the license for Mrs. Bell; but at no time was Mr. Lewis the licensee, as is evidenced by his attempt to secure a transfer of the license to himself and Dr. English. No party can become a licensee without the consent of the LCC. The unconstitutional action of the City Commission prevented the transfer from being presented to the LCC for its consent. The sole owner was Patricia Ettress Bell, succeeded by the Trustee.

The findings of fact and conclusions of law of the Referee are affirmed with the exception of those findings relating to the action of the local administrative agency.

However, since the action of the local administrative agency was void, the license became the Trustee's, still

subject to the lawfully pending transfer to Mr. Lewis and Dr. English.

The Michigan Liquor Control Act states that approval by the local body must precede the grant by the LCC. It also states that "transfers may be made with the consent of the LCC." MSA 18.988.

By virtue of this opinion, the transfer must now be treated as approved by both the local legislative body and by the Grand Rapids police. Before the application for transfer can be effective, the LCC, in the exercise of its discretion, must first consent to the transfer.

This brings the court to the final matter of consideration in this drawn-out transfer proceeding. After four hearings before the Safety Committee, the Committee on November 14, 1962, moved that the license be placed in escrow by November 20, 1962 by the Trustee and Mr. Lewis or be revoked. The true legal interests of the parties at that time were as set out in this opinion — the Trustee is the owner of the license subject to the transfer pending to Mr. Lewis and Dr. English and the March 20, 1962 agreement.

Both Mr. Lewis in his complaint, and the Trustee in his position as cross-plaintiff, have alleged that the revocation hearings denied them due process of law. The Michigan statute in regard to revocation provides:

> "* * * Upon request of the local legislative body in any county of less than 1,000,000 population, *after due notice and proper hearing by the body,* the commission shall revoke the license of any licensee granted a license to sell beer and wine or spirits for consumption on the premises." MSA 18.988, as amended by Public Acts 1957, No. 275, effective Sept. 27; and Public Acts of 1960, No. 151, effective May 23. (Emphasis supplied.)

Again, it can be seen that the action of the legislative body is a mandate to the Commission — "The commission *shall* revoke." "Due notice and proper hearing" is the statutory requirement of due process.

Without setting out again all the cases declaring what a "proper hearing" is within the demands of due process, see the Willner case, supra. It is enough to state the following proven facts concerning the revocation hearings.

The first revocation hearing was held October 16. There was no reporter present, and no record made, so the court is not informed whether or not procedural due process was accorded *at this hearing.* The absence of a record is a denial of due process.

U.S. v. Morgan, supra, 298 U.S. 480-481, in discussing the meaning of the statutory provision "full hearing" points out:

> *"The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. * * * But there must be a hearing in a substantial sense."*

The Michigan Supreme Court in Dation v. Ford Motor Co., supra, quoting with approval from 19 N.W. 2d 799, said:

> *"Due process requires that the evidence on which an agency, board, or commission bases its findings be ascertainable. This court must have the necessary data on which to determine the correctness thereof."*

At the request of the Safety Committee, the City Attorney sought to advise the Committee regarding the procedure to be followed in the revocation hearings. He put his position in a letter dated October 11, 1962. While the letter does not state specifically that a record should be made, it sets out a procedure parallel to that followed in the courts — presentation of evidence, cross-examination, and a decision based on facts and findings.

At the second revocation hearing on October 24, no reporter was present, but a few notes were taken by the secretary of the City Attorney. Again, no record is a violation of due process.

At the third revocation hearing on November 7, a court reporter was furnished by the Safety Committee. It appears that the reporter for the final hearing on November 13 was furnished by Mr. Lewis.

The most serious denial of due process in these hearings resulted from another action of the Committee. At the close of the November 7 hearing, Mr. Lewis was not finished with his cross-examination of Mr. Arens. At the close of that hearing the Committee considered Mr. Arens under subpoena for the hearing on November 13. According to the record before the court, very little time was accorded Mr. Lewis for cross-examination of the witness at this hearing.

Mr. Arens did not appear at the November 13 hearing. Both Mr. Lewis and Mr. DeGroot, attorney for the Trustee, stated they had further questions for him.(6) No further opportunity was afforded for cross-examination of Mr. Arens.

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(6) Mr. Vanden Berg: What are your plans?

Mr. Lewis: First to restate some of the notes I have here and then to continue cross-examination of Mr. Arens. That was my original plan, and go into some questions with the Chief of Police.

* * *

Mr. Miller: (City Attorney) I suggest we ignore the testimony of Mr. Arens of last week and Mr. Lewis be given the opportunity to proceed.

Mr. Lewis: I certainly do not agree to that procedure.

Mrs. Lamberts: I move we follow the procedure suggested by the City Attorney.

Mr. Lewis: You feel you are able to throw out of your mind all of Mr. Arens' testimony, the majority of which was in answer to questions from you?

Mrs. Lamberts: My motion is we proceed to disregard the testimony of Mr. Arens and Mr. Lewis be allowed to proceed to ask questions of the Police Chief and Lt. Szumski relative to this question of revocation.

Mr. Vanden Berg: I think I will have to agree with Mr. Lewis. We might be able to do this but this testimony has been imbedded in our minds and will influence us. * * *

(Tr. pp. 7-8)

At the November 13 hearing, Mr. Lewis was allowed to cross-examine Chief Johnson. A time limit was placed on the hearing, as it was on the November 7 hearing. Although Mr. Lewis stated that he had witnesses present he wished to present, the hearing was adjourned without affording him the opportunity to do so. Time was never made available for the Trustee's attorney to cross-examine witnesses present, or present evidence he may have had relating to this license.

These hearings therefore denied due process to Mr. Lewis and the Trustee, Mr. Nichols, in that: no record was made at two of the hearings; the right of cross-examination was substantially ignored; and the right to present evidence was fully ignored.

By resolution dated November 13, the Safety Committee recommended that the license be placed in escrow by November 20 or be revoked. At the time of this resolution, the Safety Committee knew that the Trustee was under a stay order from the Referee in Bankruptcy preventing him from taking any action in regard to this license.

Escrow is a voluntary arrangement by the licensee; the Safety Committee had been told this directly by the LCC. Revocation can be requested by the local legislative unit upon the exercise of its discretion. This discretion may not be abused. Revocation cannot be requested as an ultimatum to an order by the Committee to place the license in escrow.

Revocation must have a basis in fact, and these facts must be ascertainable. A record must be made before there can be any semblance of a "proper hearing". Cross-examination must be allowed. It is enough at this point to quote the Supreme Court in the Willner case, supra:

> *"We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose work deprives a person of his livelihood. * * * We think the need for confrontation is a necessary conclusion from the requirements of procedural due process in a situation such as this."* At pages 229-230.

The action of the Safety Committee requesting revocation of the liquor license for Barnett's Bar through the City Commission is void for denying due process to Mr. Lewis and the Trustee.

For the reasons stated in this opinion, the revocation of the license by the City Commission denied to Patricia Ettress Bell, to the Trustee, Mr. Nichols, and to Mr. Lewis, equal protection of the law.

The motions remaining to be ruled on may be disposed of quickly. The motion to dismiss of defendants City of Grand Rapids and Superintendent of Police, William A. Johnson, filed April 2, is denied.

The jurisdictional ground was ruled on at the trial. Not a partnership, but an individual has claimed a violation of constitutional rights.

In this court's opinion, plaintiff has no adequate administrative remedy; and if so the court would not require its exhaustion. McNeese v. Board of Education, ... U.S. ....., 10 L.Ed. 2d 622, decided June 3, 1963.

The motion filed by these defendants June 12 raises no questions not answered in this opinion, and is, therefore, denied.

The motion to dismiss of the LCC filed November 30 and subsequently renewed, is granted. The complaint and proofs fail to make any claim upon which relief can be granted.

The facts in this opinion are to be considered as findings of fact, and the law conclusions of law within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure.

It is ordered that the City of Grand Rapids, through its constituted officials, approve the transfer of the license at Barnett's Bar and Lounge to Mr. Lewis and Dr. English.

It is ordered that the Chief of Police cause his investigation form 1800 to be filed with the LCC, showing recommendation of the transfer to Mr. Lewis and Dr. English.

It is ordered that the findings of the Referee in Bankruptcy concerning the ownership of this license be affirmed, with the noted exception.

It is further ordered that the defendants William A. Johnson and the City of Grand Rapids, its city commis-

sioners, any officials, agents or employees, or any other person or persons acting for, with, or in concert with city officials, or any agent or employee of the City of Grand Rapids, are severally and individually enjoined from directly or indirectly interfering with the transfer of the liquor license involved in this case; or from directly or indirectly using any fruits from any conspiracy among themselves, or with any other person or persons, as a means of preventing the transfer of the Class C liquor license from Patricia Ettress Bell, through the Trustee in Bankruptcy, William Nichols, to Alphonse Lewis, Jr. and Dr. Cortez English, during the pendency of this litigation and/or during the pendency of the application for transfer before the LCC of the State of Michigan; and from communicating in any way with the LCC, or any of its officers, agents, or employees, except as is provided by law and as is in accordance with due process and fair procedural practice.

Dated: September 13, 1963.

Noel P. Fox
District Judge

APPENDIX I.

CONTRACT AND AGREEMENT

This contract and agreement entered into this 20 day of March, A.D. 1962, by and between Alphonse Lewis, Jr., hereinafter known as first party, and Patricia Ettress, hereinafter known as second party, WITNESSETH:

WHEREAS, the parties hereto have heretofore been involved in various contracts relating to the operation of a Class C Liquor License under the name and style of Barnett's Bar & Lounge and

WHEREAS, second party is indebted to first party for monies loaned, chattel mortgages, management fees and legal fees, and

WHEREAS, first party has filed a suit against second party in the Circuit Court for the County of Kent.

NOW, THEREFORE, in consideration of the covenants and agreement herein, it is agreed by and between the parties hereto as follows:

I.

That, Patricia Ettress, second party, covenants and agrees:

1. To transfer, convey and assign all of her right, title and interest in the Class C Liquor License heretofore operated as Barnett's Bar & Lounge, to Alphonse Lewis, Jr., his heirs or assigns;

2. To execute and place in escrow any papers necessary to the completion of this agreement and the transfer and assignment of said Class C Liquor License to Alphonse Lewis, Jr. or his assigns;

3. To sign and deliver to first party at the time this agreement is signed a request for and consent to the Grand Rapids Police Department, the Grand Rapids City Commission and the Michigan Liquor Control Commission; requesting their consent to the transfer of said license from second party to first party or his assigns;

4. To execute any and all papers necessary to completely carry out all the terms of this agreement or in lieu thereof said papers shall be signed upon orders of a Judge of the Kent County Circuit Court in case No. 65570;

5. To stipulate and agree to the immediate appointment of Alphonse Lewis, Jr. as a receiver of said license and his appointment as such receiver by

order of the Circuit Court for the County of Kent in the case presently pending therein and issuance of the Class C Liquor License to said receiver by the Liquor Control Commission pending approval and transfer of said license to Alphonse Lewis, Jr., his heirs or assigns;

6. To assign all her right, claims and causes of action against Frederick Poel and/or Rosalind Bolt Larsen, their heirs or assigns or the heirs or assigns of Menso R. Bolt, said assignment to include claims and causes of action of any kind or nature;

7. To make the Circuit Court for the County of Kent or the Judges thereof irrevocable attorneys and agents in fact with the power and authority to authorize and decree any act to be done in consummation of this agreement;

8. To transfer to the receiver all alcoholic beverages contained in the inventory submitted to the Liquor Control Commission without costs;

9. To do no act or acts to improperly or unduly interfere with the operation of said business by said receiver or the completion or execution of this agreement;

10. To transfer, assign and convey to first party all rights, claims and causes of actions against Arnold R. Levandoski, his heirs, estate or assigns or the partnership of which he was a part during his lifetime;

11. To release all right, title and interest in any of the personal property heretofore used in the operation of said Barnett's Bar & Lounge and any equity of redemption of the chattel mortgage in said premises on said personal property held or claimed by second party;

12. To cooperate fully with first party for conferences and court appearances, if any be necessary, in

connection with any of the claims against second party or in the enforcement of any of the claims second party assigns to first party;

13. To keep first party advised of her whereabouts at all times and not to cooperate with any of her creditors or to do any other act or thing to jeopardize first party's exercise of assignments or claims or defense to any claims or causes of action against second party.

In consideration of the covenants and agreements herein, first party agrees to:

1. To settle, compromise and hold second party entirely harmless from the following debts and obligations provided all of said debts can be settled and compromised for a sum not to exceed $7100.00.

   Dr. Cortez English
   Taylor O. Hayes
   Decker, Davies, Jean and Mackey Insurance Agency
   Arthur Kramer or Dorothy Kramer, doing business as Kent Bookkeeping Service
   Personal property taxes for the City of Grand Rapids
   Personal property taxes for the County of Kent
   Michigan Department of Revenue, for taxes, including, but not limited to sales taxes and business activities taxes
   United States Internal Revenue Service including but not limited to the 1959, 1960 and 1961 withholding and personal income taxes and 1962 excise taxes;

2. To save second party harmless on all claims and obligations and causes of actions by Frederick W. Poel, Rosalind Bolt Larson and heirs or assigns or the Estate of Menso R. Bolt arising out of the handling of or connected with the handling of, the

Estate of Stanley Barnett, Sr., Bessie Barnett, Stanley Barnett, Jr. and/or Patricia Barnett, or arising out of or being a part of a present claim in a suit by Frederick W. Poel and Rosalind Bolt Larson in the Kent County Circuit Court against second party.

3. To save second party harmless from all claims and causes of actions by Arnold Levandoski, his heirs, assigns or estate or the law firm with which he was connected at his death;

4. To pay to the law firm of Rom and Newton Dilley the sum of $1700.00 in escrow upon the terms and conditions hereinafter provided to be held by them in trust for the payment of their fees and expenses, the Associates Discount or Loan Corporation and miscellaneous debts of second party;

To pay the sum of $200.00 at the time of execution of said agreement and the sum of $200.00 on August 1, 1962 and the sum of $100.00 Sept. 1, 1962 and the sum of $100.00 on the 1st day of each following month so long as first party is operating the bar as receiver until a total sum of $1700.00 is paid;

It is further understood and agreed that on August 1, 1962 the said lawfirm of Rom and Newton Dilley may withdraw from said trust fund and apply to their fees the sum of $400.00 and on September 1, 1962 may withdraw and apply upon their fees the sum of $100.00 and a like sum of $100.00 on the 1st day of each month during the operation of said business by Alphonse Lewis, Jr. as receiver until the sum of $1000.00 has been so applied;

Notwithstanding any of the above terms and conditions, any balance of said $1700 not already paid shall be paid within 10 days after the transfer of said license and may be applied immediately as hereinbefore stated;

5. To act as receiver for the operation of said bar during the pendency of proceedings for the transfer of the license to first party; and hold second party harmless from all obligations in connection therewith;

6. To receive no other compensation as receiver other than the net preceeds from the operation of said business heretofore known as Barnett's Bar & Lounge;

7. To refrain from any attempt to recover or obtain any money or thing of value from second party arising out of the operation of Barnett's Bar & Lounge or any other claim first party may have against second party and to hold second party entirely harmless thereform and particularly, but not limited to, claims for rent, loans, manager's fees and attorney's fees.

It is further covenanted and agreed between the parties hereto that first party shall dismiss or be responsible for obtaining dismissal of the present suit by first party and Dr. Cortez A. English pending in the Kent County Circuit Court upon the transfer of the Class C Liquor License to first party or his assignees.

It is further covenanted and agreed that the receivership of Alphonse Lewis, Jr., shall be terminated 10 days after final disapproval of the transfer of the Class C Liquor License from second party to first party or his assignees or the final refusal of the United States Internal Revenue Service to compromise and settle its claims against second party in accordance with paragraph (1) above, whichever first occurs. It is further agreed that a successor receiver may be appointed upon the mutual consent of the parties hereto and the proceeds of said business or operation shall be paid to the Clerk of the Court at intervals not to exceed 60 days or as directed by the Kent County Circuit Court in case No. 65570.

It is further understood and agreed that the proceeds over and above the necessary expenses of the successor re-

ceivership as approved by the Court shall be held in trust for the following purposes; and order of priority;

(a) For the payment of any unpaid portion of the reasonable attorney fees owed by second party to her attorneys, Rom and Newton Dilley;

(b) For the payment to first party in refund of any sums first party has paid to Rom & Newton Dilley to apply on, or have been applied on their attorney fees under this agreement, this being a reference to the initial and monthly payments payable to Rom & Newton Dilley in escrow as hereinbefore provided;

(c) For the payment to first party in refund of the license fees that he has in fact paid, pro-rated for the unused portion of the license year during which his receivership terminates.

It is further covenanted and agreed that this agreement is not and shall not be considered a third party beneficiary contract or for the benefit of any other person or persons other than the parties hereto and shall not be enforceable by any other person or persons other than the heirs or assigns of the parties hereto.

It is further stipulated and agreed that this agreement shall be subject to the transfer of the license from second party to first party or his assigns by the Michigan Liquor Control Commission and that no money shall be paid out in connection with this agreement except as herein provided until the transfer of said license is so approved and transferred to first party.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this 20 day of March, 1962.

(s) Alphonse Lewis, Jr.
(s) Patricia Ettress

WITNESSES:

(s). Charles N. Dewey, Jr.

APPENDIX II.

(Letterhead of Liquor Control Commission — Lansing)

April 6, 1962

Grand Rapids Police Department
Grand Rapids, Michigan

Attention: Chief of Police

Dear Sir:

Under date of October 13, 1961 we forwarded two (2) forms LC 1800 to cover the transfer of the Class "C" license held in the name of Patricia Ettress to Alphonse Lewis and Dr. C. A. English.

This has been a complex matter which we hope has now been satisfactorily clarified. We understand the violations and tax difficulties have all been resolved.

The 1961 license has been returned to the location where it is being operated under a Power of Attorney issued by the licensee.

It is respectfully requested we be furnished the 1800 forms with whatever recommendation the Police Department intends, in order we may clear up this matter as soon as possible.

We have a copy of notice No. 65570, in which the licensee, Patricia Ettress, requests the local authorities in Grand Rapids to permit the transfer of the license.

May we hear from you at your convenience regarding this matter.

Very truly yours,

MICHIGAN LIQUOR CONTROL COMMISSION

(s) Edward F. Maloney
Edward F. Maloney, Director
License Division

EFM:br

APPENDIX III.

(Letterhead of U.S. Treasury Department, Internal Revenue Service, Office of the District Director)

Grand Rapids, Michigan
April 12, 1962

In Reply Refer to
DAR: 15 GFF

Superintendent of Police
City of Grand Rapids
Grand Rapids, Michigan

Re: Transfer of Liquor License
From
Patricia Ettress
To
Alphonse Lewis, Jr.

It has been brought to the attention of this office that Mr. Alphonse Lewis, Jr., Attorney at Law, Grand Rapids, Michigan has applied for the transfer of the Liquor license held by Patricia Ettress, DBA Barnett Bar, 60 Ionia Ave. S.W., Grand Rapids, Michigan.

For your information, Patricia Ettress is indebted to the Federal Government for past due Federal taxes for which Notices of Lien have been filed with the Register of Deeds, Kent County, Michigan.

A "Stop Order" has been placed on the transfer of this license with the Michigan Liquor Control Commission asking for their cooperation in holding up any transfer until the Government's obligation is satisfied.

If at all possible, this office would like a similar order be made a part of your file in the matter of the transfer of the license to Mr. Lewis.

Thanking you for your cooperation in this and past matters I remain,

Sincerely,

R. I. Nixon
District Director
By:
Gordon F. Forell
Revenue Officer

APPENDIX C

OPINION

(Filed February 16, 1966
(356 F. 2d 276)

No. 15669

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALPHONSE LEWIS, JR.,
Plaintiff-Appellee,

vs.

CITY OF GRAND RAPIDS, MICHIGAN, ET AL.,
Defendants-Appellants.

Appeal from the U.S. District Court of the Western District of Michigan.

Decided February 16, 1966.

Before Cecil, O'Sullivan and Edwards, Circuit Judges.

O'Sullivan, Circuit Judge. Appellants, City of Grand Rapids, Michigan, and its Chief of Police, William A. Johnson, challenge a judgment of the United States District Court which vacated an order of the Grand Rapids City Commission denying approval of the transfer of a Class C liquor license to plaintiff-appellee, Alphonse Lewis, and affirmatively ordered the Chief to recommend and the City to grant such approval. Under the Michigan Liquor Control Act, such approval was required before the Liquor Control Commission would effectuate the transfer. M.S.A. § 18.988. *Roodvoets v. Anscer,* 308 Mich. 360

The District Judge held that the City Commission's action was the product of racial and other invidious discrimination and that plaintiff, a negro, was entitled to, and was denied, due process of law in the City's consideration of his application for such approval. After the desired approval was refused, and after a subsequent resolution of the Commission requesting the Liquor Control Commission to revoke the involved license, plaintiff brought this action in the United States District Court at Grand Rapids. His complaint charged deprivation of rights guaranteed by the First and Fourteenth Amendments to the United States Constitution, and asserted jurisdiction under pertinent civil rights sections of the Judicial Code.

We hold that the District Judge erred in his conclusion that consideration of the transfer application had to comply with traditional procedures of due process, viz, specification of grounds for refusal, presentation of evidence supporting such grounds, confrontation of witnesses with opportunity for cross-examination, and like procedures.

If racial bias or invidious discrimination motivated the actions of the City of Grand Rapids, or if denial of the transfer approval was the consequence of a conspiracy to deny plaintiff Lewis his civil rights, then such actions must be struck down as a denial of the Fourteenth Amendment's guarantee to plaintiff Lewis of equal protection of the law. *Glicker v. Michigan Liquor Control Commission*, 160 F(2) 96 (CA 6, 1947). Our review of the entire record of the case, however, leaves us with "the definite and firm conviction that a mistake has been committed" by the District Court findings in such regard. *United States v. U.S. Gypsum Co.*, 333 U.S. 364,395, 92 L. Ed. 746, 766 (1948). Fed. R. Civ. P. 52(a). We reverse the judgment of the District Court of the extent that it vacates the order of the City Commission denying the transfer and affirmatively orders approval thereof. The City's brief does not challenge the District Judge's finding of denial of due process in the revocation of the license. We therefore, do not discuss that. *McGraw v. United Ass'n of Journeymen & App. of Plumbing, etc.*, 341 F(2) 705 (CA 6, 1965).

Much of the troubled history of Barnett's Bar, a Class C liquor establishment of Grand Rapids, is set forth in the

extensive opinion of the District Judge. *Lewis v. City of Grand Rapids*, 222 F. Supp. 349-396 (W.D. Mich. 1963). The opinion contains the District Judge's subjective conclusions and factual inferences upon which he based his findings. The Chief of Police and six of the seven members of the City Commission of Grand Rapids were convicted of conspiring to invidiously discriminate against plaintiff Lewis, motivated, at least in part, because he was a Negro.

Plaintiff Lewis relevant connection with Barnett's Bar began in early 1959. Mr. Lewis, an attorney, had represented Patricia Barnett while she was under guardianship during her minority. Her properly at that time consisted principally of her interest in the estate of her deceased father, the former licensee of Barnett's Bar, who had also been a client of Mr. Lewis. By marriage, Patricia Barnett became Patricia Ettress, and later Patricia Bell, The Liquor Control Commission did not consider this then 23 year old girl qualified to operate the bar and an initial step in Mr. Lewis' service to his young client was the making, on May 20, 1959, of a contract which made him the manager of Barnett's Bar. This arrangement was approved by the police authorities of Grand Rapids and was apparently required by the Liquor Control Commission as a condition to restoration of the license which had been suspended because of previous defaults. By this contract, plaintiff Lewis was to act as Mrs. Ettress' attorney as well as manager of her bar. He was given broad powers to sign all needed documents, and otherwise to exercise full control over the operation of the bar, including the right to hire and fire all of its employees. Lewis was to be paid 6% of the bar's gross sales for the first year of his employment and 10% for the second and any subsequent term of the contract, with a guaranteed annual minimum compensation of $2,000.00. The contract further provided that Lewis was to be "the agent and attorney in fact" for his client. The record is unclear as to the amount of time Mr. Lewis spent at the bar in performance of his managerial duties. During the time of his management there were several defaults in payment of federal and state taxes, although it appears that Mr. Lewis cured at least one of such defaults with a loan from his

own funds. One or more of such defaults brought about so-called "stop" orders to prevent the continued operation of the bar. During this period Lewis obtained a chattel mortgage on the bar equipment to secure advances made to Mrs. Ettress.

In August of 1960, as the consequence of a police investigation at the Barnett Bar premises, a complaint was filed with the Liquor Control Commission and with a Judge of the Police Court of Grand Rapids that the persons named therein were carrying on "the numbers game." Arrests of several persons were made. Mr. Lewis acted as attorney for those arrested and ultimately all charges were withdrawn or dismissed except as to one accused who pleaded guilty on October 2, 1961, to the unlawful possession of policy or pool tickets "at 58-60 Ionia Avenue, S.W." — the building where the bar was located.

On November 15, 1960, Patricia Ettress agreed to sell her license and business to one Dr. Cortez English for $18,000.00. In May of 1961, Lewis amended the English agreement to add himself as a purchaser with Dr. English. In April of 1961 Lewis had acquired a contract purchaser's interest in the building in which Barnett's Bar was located. The sellers had acquired their title from Patricia Ettress' stepmother. The contract of purchase in which Lewis acquired an interest was in the names of his sisters. Following the making of the contract under which Mr. Lewis was to join in buying out his client, there began the steps to get the needed approval of a transfer of the license to plaintiff Lewis and Dr. English.

During 1961 and into 1962, Mrs. Ettress at various times expressed her dissatisfaction with Mr. Lewis' conduct and with his plan to acquire her license. On several occasions she wrote to the Liquor Control Commission, withdrawing her consent to a transfer. On May 10, 1961, she wrote to Lewis expressing her desire to terminate the management contract, stating "you are unable to take care of my affairs * * * because of conflicting interest." On October 21, 1961, following two and one-half years of Lewis' management of the bar, Mrs. Ettress reported to the Liquor Control Commission that her bar business was then under padlock for failure to satisfy Federal tax liens and that her license

was then in the hands of the Internal Revenue Service; that her only out "now as before" was to sell her business to pay her debts. She asked that the pending application for transfer be withdrawn "because of some things that have happened since that application was sent in originally with only Dr. Cortez English as the buyer, before he requested that attorney Alphonse Lewis, Jr., be named as a partner." Her letter proceeds,

> "He has been the manager of the before mentioned Barnett's Bar and also my attorney and financier on many occasions. I had repeatedly asked him for a final accounting and he gave it to me this summer after I was all ready committed to sell it to him. But, in a nut shell it goes as follows, for managers fees from May 21, 1959 to May 21, 1961, 6% of the gross income for the first year and 10% of the gross income for the second year. Which came to $8,406.78. I of course had never been in business before and that was why the Commission requested that I have a manager at the time and also because I was only twenty-three at the time. Then also he wasn't what he referred to as a working manager because he is a attorney by profession law. So of course there were times when he didn't even come near the business few days at a time. He also billed me for miscellaneous legal fees which came to $2609.50. I felt that some of these came under management. In loans from him the amount comes to $6079.87, with 6% interest added in of course. The latter of which I'm more than willing to pay back to him and I have no doubt in my mind that I owe him for what I borrowed from him. The grand total of this is $17,096.15. The sale that I mentioned before was for only $18,000. As you can see this leaves me with the problem of paying my other obligations, which I couldn't pay for in a life time as I couldn't possibly earn enough on a job to pay them.
>
> * * *
>
> "I'm sending you a copy of a agreement that Mr. Lewis gave me to be considered and signed by me in

lieu of a loan of $800.00 more to be paid by him to the Internal Revenue office to release the padlock. We had tried a situation similar to this and instead of his paying the tax he was in Lansing at some kind of a hearing with your Mr. Ressi to reconsider his application. He had however been in charge of the money because he had loaned me money to avoid closing for sales tax and I thought perhaps the whole business would be cleared up before this situation would have to be continued for long as it was not agreeable to me.

"He had however gotten money from the bar to pay these taxes to a degree that would have satisfied Mr. Farrell. Instead the bar was padlocked and that is how things stand at the present time. He paid some of the obligations of the bar and kept the rest for his bill or against his bill I should say and he wouldn't even give me the money as I had none to live on because I had been home sick."

On December 19, 1961, Mrs. Ettress wrote the Commission "that the application for transfer of my license to Mr. Lewis and Mr. English is hereby cancelled."

Tax defaults were chronic during the upwards of three years of Mr. Lewis' management and it appears that for such entire period the personal property taxes due the City of Grand Rapids went unpaid. Additional circumstances preventing a license transfer were the long pending gambling charges. It was a policy of the Liquor Control Commission not to complete a transfer of a liquor license while violation charges remained outstanding. The long and confused route of the charges against the bar is set out in the District Judge's opinion, 222 F. Supp. at pages 353-355. From August, 1960, when some four or five men were arrested in a raid at the bar premises, until October 2, 1961, some charges remained pending. All of those charges were represented by Mr. Lewis. Two of those were dismissed on examination, two more had their cases nolle prossed, and one entered a plea of guilty to the possession of gambling paraphernalia "at 58-60 Ionia Avenue" — the address of

the building where the bar was located. The District Judge found that this charge did not involve the bar itself, but we are unable to clearly understand how this conclusion was arrived at. Following the above dispositions, the Liquor Control Commission on October 31, 1961, concluded its own investigation of the gambling charges. Its report concluded that "there is no doubt * * * that there has been some gambling operations in your bar with the knowledge of your bartender." The examining officer dismissed the charges with the observation that he "was glad you're (Mrs. Ettress) going out of the business and I understand that you're (Lewis) going on * * *. I'm sure you'll (Lewis) be able to curtail the activities." All of the foregoing, however, occurred during Lewis' management. He appeared, however, to cast the blame for any irregularities upon his client, Mrs. Ettress.

While the end of the gambling charges came, tax difficulties were continuing. Appellee Lewis recites transactions which eventuated in his acquiring his client's interest in the bar fixtures,

> "In August of 1961 the sales tax man and the state police came to close her up, and after a half day conference they agreed if she turned over financial control of the bar to me, if I kept track of the money that came in from the bar and paid the sales taxes, that they would let her continue to operate, in addition also upon my paying $500 to them immediately and paying the sales tax weekly.
>
> "Thereupon, this was communicated to Mr. Farell of the Internal Revenue, and at that time Mr. Farell had demanded that she come up with certain amounts of money. I had some money at that time and offered to pay it to Mr. Farell, if Mrs Ettress would be sure that she didn't dissipate any more of the money. I could never get a firm agreement out of her, to my satisfaction, and so I did not pay Mr. Farell that particular money, and Mr. Farell was kept aware, of course, of the money as it was accumulated. Then he closed the bar, as indicated here before."

On November 13, 1961, the Internal Revenue agent sold the bar fixtures at auction and Lewis bought them in for $50.00. The $50.00 paid did not satisfy the Internal Revenue taxes and the bar remained closed from September 21, 1961, until April 6, 1962. Lewis asserts that by such purchase he acquired for himself his client's equity in the bar equipment over and above Lewis' chattel mortgage. He testified:

> "Q. * * * You purchased certain property from the Internal Revenue Service on auction sale on November 13, 1961, is that correct?
> "A. Correct.
> "Q. What price did you pay?
> "A. $50.00. Now, that was also the second auction. The original auction went for $1,400.00 and the person couldn't pay for it. * * *.
> "Q. What did you purchase on that auction?
> "A. It was the equity * * * the equity of redemption of Mrs. Ettress over and above the chattel mortgage which I then held on all the bar equipment."

The complaint in this case alleges that the Internal Revenue Service "sold all the right, title and interest of Patricia Ettress at public sale * * * *to plaintiff* (Lewis)." We do not find that Lewis has ever announced or considered that the title he then acquired was to protect or as trustee for his client. In December, 1961, Patricia Ettress wrote to the Liquor Control Commission that she considered the application for transfer to Lewis and Dr. English void. On December 14, 1961, she made a sworn statement to a Grand Rapids Police Lieutenant that she would not go through with a sale to Lewis and English, saying, "I don't want to transfer it to them simply for credit for Mr. Lewis' bills." The confusion existing in these months is set forth in the District Judge's opinion at 222 F. Supp. 356-358.

Mrs. Ettress' recalcitrance was met by a lawsuit filed on December 21, 1961, in the State Circuit Court at Grand Rapids, whereby Mr. Lewis sought to specifically enforce the agreement that his client had made with Dr. English and to which he had become a party. His complaint asked

that he be appointed receiver of Barnett's Bar. This was refused. Lewis' application for transfer continued undetermined into 1962. The Safety Committee of the Grand Rapids City Commission which was considering the request for transfer to Lewis and Dr. English, undertook to study Lewis' lawsuit against his client, the transferor. On March 20, 1962, an agreement settling the lawsuit was entered into. By it, Lewis and Dr. English agreed that in addition to the $18,000 originally agreed upon they would assume and pay an additional $7,300 of Mrs. Ettress' debts. This agreement was subject to approval of the transfer of the license. See appendix to the District Court opinion at 222 F. Supp. 391.

The agreement of November 15, 1960, with Dr. English, was drafted and concluded in Lewis' office. There is nothing in the evidence to indicate that Dr. English was otherwise than Lewis' client. The sale price of $18,000 was originally to be paid in cash. It was not then geared to what Lewis' client then owed, or would owe to him for advances and services. It was after Lewis was added as a purchaser that he rendered a statement to his client totalling slightly more than $17,000. This amount was made up of loans at 6% interest, amounting to about $6,000, and Lewis' fees as manager and attorney in the amount of about $11,000. With the addition of $1,920 that Mrs. Ettress owed to Dr. English, the arrangement would leave her still owing a balance to Lewis and Dr. English. There is no evidence that in the making of this deal Mrs. Ettress had any other advisor than her attorney and manager, Mr. Lewis. In May, 1961, the price was $18,000. When she was sued for performance of that agreement by her own lawyer, Mrs. Ettress obtained new counsel. When this litigation was presumably settled in March of 1962, about $7,300 was added to the purchase price by way of assuming additional debts of Mrs. Ettress.

Among faults charged to the City Commission by the District Judge was failure to detail to Lewis its reasons for not approving him. He found as a fact that the Commission had not, prior to the revocation proceedings, made specifications to Lewis of the reasons which prompted its

actions. It does appear that no formal enumeration of the reasons for denial was provided. But, whether formally notified or not, during consideration of the transfer Lewis was aware of the things which, at the trial of this case, were identified as the causes of his being disapproved. He knew about the tax defaults and the closing of the bar therefor. He testified that he told the Safety Committee that the taxes would be paid if he was approved as a transferee. This conditional promise was not a substitute for discharge of an obligation assumed when he was given the exclusive financial control of the business. Placing the blame on his client was not an answer; neither was his intimation that his client and a boy friend were taking large sums of money from the enterprise. He knew about the gambling charges. He was the lawyer for all persons involved. He knew about his own relations with his young client, to whom he stood in a position of high trust. He knew that this fiduciary relationship ended in his suit to require her to convey to him the asset which he had been managing for upwards of two years. He knew of her complaints about his management and her "on again, off again" attitude toward transferring her license to him. The Grand Rapids authorities learned of these things in the course of their numerous hearings on the transfer application.

Members of the City Commission testified that the City Attorney had advised them that it was not necessary to specify to applicants reasons for denying a transfer, that embarrassment of such applicants was thus avoided. It seems clear that during the Safety Committee hearings the standing of Mr. Lewis as an acceptable transferee of the license for Barnett's Bar was deteriorating. We are of the view that considering the discretion vested in a City Commission in the matter of transfers of liquor licenses, the City Commission had ample ground for finding Mr. Lewis unacceptable.

Applications for transfer of liquor licenses are first referred for consideration and recommendation to a Safety Committee made up of three members of the Grand Rapids City Commission. The latter is the elected governing body of the city and consists of seven members who serve

part time, meeting regularly once a week. The Chief of Police submits a Liquor Control Commission form (LCC 1800) giving his recommendation as to transfers. This is considered, but not necessarily controlling. It had not been the practice of the Safety Committee to hold formal hearings, with the taking of testimony and like procedures.

Hearings of the Safety Committee to consider Lewis' application extended over a period from January 16, 1962, to July 31, 1962, at which latter date his application was denied. At the January 16 hearing, Lewis was present and spoke for himself and Dr. English. The matter was then tabled to allow Commissioner Sevensma, a lawyer, to review plaintiff Lewis' then pending suit against his client in the Circuit Court of Kent County, Michigan. Through this investigation, the Safety Committee learned of the character and issues involved in the litigation between Lewis and his erstwhile client, and then unwilling transferor. The above-detailed settlement of the lawsuit was made on March 20, 1962, and was conditioned upon approval of a license transfer to Dr. English and plaintiff Lewis.

On April 17, 1962, the Safety Committee again took up the matter. Lewis was present. At this meeting, the Grand Rapids Chief of Police, William A. Johnson, presented a letter dated April 12, 1962, from the United States Internal Revenue Service requesting that a "Stop Order" be placed against a transfer of the license to Lewis. This letter was signed by revenue agent Gordon F. Forell.[1] An earlier letter, dated April 6, 1962, had been written by the Liquor Control Commission expressing the Commission's

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1 The letter, addressed to the "Superintendent of Police," read:

"It has been brought to the attention of this office that Mr. Alphonse Lewis, Jr., Attorney at Law, Grand Rapids, Michigan, has applied for the transfer of the Liquor License held by Patricia Ettress, DBA Barnett Bar, 60 Ionia Ave. S.W., Grand Rapids, Michigan.

"For your information, Patricia Ettress is indebted to the Federal Government for past due Federal taxes for which Notices of Lien have been filed with the Register of Deeds, Kent County, Michigan.

"A 'Stop Order' has been placed on the transfer of this license with the Michigan Liquor Control Commission asking for their cooperation in holding up any transfer until the Government's obligation is satisfied.

"If at all possible, this office would like a similar order be made a part of your file in the matter of the transfer of the license to Mr. Lewis."

understanding that "This has been a complex matter which we hope has now been satisfactorily clarified. We understand the violations and tax difficulties have all been resolved." The Safety Committee's desire to have reconciled this apparent conflict between the Liquor Control Commission's April 6 statement that the tax difficulties had been settled and the Internal Revenue letter requesting a "Stop Order" for failure to pay federal taxes is emphasized by the District Judge as indicative of bad faith in the Safety Committee's delay in approving the transfer. Lewis contends, and the District Judge agrees, that the Chief of Police solicited the Internal Revenue letter as a means of thwarting Lewis. The Chief's denial of soliciting the letter and his attempt to explain it was cut off by the sustaining of a Lewis objection.[2] The charge of solicitation finds its principal support in plaintiff Lewis' hearsay statement that he had heard that such was the case. In all events, we find no impropriety in the Chief's presentation of the letter, especially in view of the chronic tax delinquencies of the bar under Lewis' management. Whether solicited or not, the factual correctness of the Forell letter is not questioned, viz.: that notices of federal tax liens had been recorded; that a "Stop Order" on the transfer *had been placed* with the Liquor Control Commission; and that the Internal Revenue Service desired similar action by the City of Grand Rapids. The record does indicate that Chief Johnson was developing a view that Lewis was not a desirable licensee for this bar. In addition to the tax delinquencies, the Chief considered that the charged operation of the numbers game at the bar, and Lewis' conduct in handling his client's affairs, lessened his attractiveness as a licensee.

Between the April 17 and the July 24, 1962 meetings, investigation by the Liquor Control Commission continued; the agent in charge reported difficulty in contacting Lewis, and Lewis then indicated that he was not in a hurry to

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2 "Mr. Forell came into my office with Captain Szumski, explained the tax difficulties that they had had with this establishment, *informed me he placed a 'Stop' order with the Michigan Liquor Control Commission*, and seemed to be quite concerned that * * *" (Here an objection was sustained on the ground of hearsay)

have the investigation concluded. On July 24, 1962, a hearing was held before the Safety Committee with Lewis, Dr. English, Mrs. Ettress, and her then attorney present. Mrs. Ettress was then agreeable to a transfer to Lewis and Dr. English. There is dispute as to what was said and done at the meeting, but seemingly all present had an opportunity to express themselves. This meeting concluded with a carried motion that the matter be tabled for three weeks. At the trial of this case, Lewis and the city officials expressed differing understandings of the import of tabling the matter. Lewis stated that he assumed a further hearing would be held in three weeks. Safety Committee members considered that the hearing was concluded and that the tabling was merely for the purpose of allowing the Committee to consider its decision, and to obtain some further information from the Liquor Control Commission.

In all events, at the next regular meeting of the Safety Committee, July 31, 1962, the matter was taken from the table by unanimous vote, and denial of the transfer recommended. Lewis was not present nor given notice that such meeting was to consider his application. The reason given for acting without waiting the three weeks was concern that contemplated vacations of committee members might prevent early action. On the same day, at the regular meeting of the City Commission, the Safety Committee's recommendation was unanimously approved by the six members then present. The Chairman of the Safety Committee in reporting to the Commission, convened as a Committee of the Whole, gave as reasons for denial of the transfer the tax situation, Lewis' dual capacity "as manager, advisor and counselor" and the "poor operation" of the bar under his management. These reasons, however, were not made a part of the formal motion by which the Commission adopted the Safety Committee's recommendation.

The affairs of Barnett's Bar deteriorated further following the denial of the transfer to Lewis. Mrs. Ettress, the licensee, had moved to Flint, Michigan. She had, on March 20, 1962, executed an assignment of her license to

Lewis and Dr. English. On September 10, 1962, she filed a voluntary petition in bankruptcy. The license for the Barnett Bar was the principal asset of the bankrupt estate. A contest arose between Lewis and the trustee in bankruptcy as to its ownership. Lewis contended that as assignee of the bankrupt he was the owner. The referee held that the trustee was the owner. Thereafter, on October 2, 1962, the City Commission of Grand Rapids initiated steps which culminated on November 20, 1961, in a resolution requesting the Michigan Liquor Control Commission to revoke the license of the Barnett Bar.

Because the District Judge's vacation of such request for revocation is not here involved, we need not give detailed recital of relevant events. Under advice of the City Attorney, and because the Michigan statute, M.S.A. § 19.988, requires that a request to the LCC for revocation be preceded by "due notice and proper hearing," the City Commission attempted to set up and hold a hearing that would comply with due process. The several hearings antecedent to the final resolution, held on October 16 and 24 and on November 7 and 13, created excitement and confusion. There is no doubt that by this time opposition to and possibly dislike of Mr. Lewis had developed and there was evidence of remarks expressive of an intention to resist his efforts to take over Barnett's Bar. On November 13, by unanimous vote of 7 to 0, the City Commission requested that the license be revoked "unless the same is placed in escrow with the Michigan Liquor Control Commission prior to November 20, 1962."[3] The license not having been placed in escrow prior to November 20, the Commission, on that date, requested unconditional revocation of the license. The Mayor of Grand Rapids cast a dissenting vote to such request. Except for this, all previous actions by the City Commission involving the Barnett Bar license had been by unanimous vote. On November 19, 1962, the complaint in the case at bar was started.

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[3] Under Michigan practice, where an underlying business has been interrupted or suspended, its license may be held "in escrow" awaiting its transfer to a new location or owner. The bankruptcy trustee was agreeable to such escrow, but Lewis was not.

Before setting out the reasons which prompt our decision, we should give this broad summary of the case. The relevant and troubled history of the Barnett Bar began in May, 1959, when Lewis took over its management for his client, and ended in his client's bankruptcy in September, 1962, at a time when he claims to have become the part owner of the bar premises, had upon foreclosure acquired the bar's fixtures, and had obtained an assignment of its license. Although by broad inference Lewis attributes some of the trouble to "dipping into the till" by his client and her boy friend, it is neither claimed nor proved that action by the police or other municipal officers of Grand Rapids had anything to do with Lewis' inability to discharge his fiduciary responsibilities so as to maintain his client's asset as a solvent and going enterprise. The only solution proposed was a sale of the business to him.

We come then to the reasons which prompt us to hold first that in the proceedings prior to denial of the transfer to Lewis the due process clause of the United States Constitution did not require the City Commission to afford plaintiff Lewis a trial-type hearing, with formal specification of reasons for finding Lewis unacceptable, with confrontation of witnesses, with the taking and recording of testimony and with other formalities that customarily attend a full dress adversary proceeding; and, second, that plaintiff Lewis was not in relation to the transfer denied the equal protection of the law guaranteed him by the Fourteenth Amendment.

First, Due Process.

Dealing with the law of Michigan, the liquor business has always been recognized as possessing a character vesting in public authorities a broad discretion in the control and regulation of it. *Shirlock v. Stuart,* 96 Mich 193 (1895); *Johnson v. Liquor Control Commission,* 266 Mich 682 (1934); *Scott v. Arcada Township Bd.,* 268 Mich 170 (1934); *McCarthy v. Thomas Township Bd.,* 324 Mich 293 (1949); *People v. Wheeler,* 185 Mich 164, 171 (1915);

Gamble v. Liquor Control Commission, 323 Mich 576, 578 (1949); *People v. Schafran,* 168 Mich 324, 330 (1912); *Case v. Liquor Control Commission,* 314 Mich 632, 643 (1946).

Scott v. Arcada Township, supra, emphasized the difference between the granting of a license and its revocation, indicating that revocation might indeed require due process. Although in *Johnson v. Liquor Control Commission, supra,* 266 Mich. 687, the Michigan Supreme Court said "a license [liquor] is not property within the meaning of due process," we need not consider the point, because plaintiff Lewis was not a licensee and could become such only upon approval of the transfer to him of the Ettress license. Section 17 of the Michigan Liquor Control Act, M.S.A. § 18.988, requires as a condition to issuance of a license, that the application therefor "shall be approved by the local legislative body." Application to become a licensee by transfer must have like approval. *Roodvoets v. Anscer,* 308 Mich. 360, 363, 364 (1944).

On this due process question, we need not accept or rely on *Hanson v. Romeo Village Council,* 339 Mich. 612, 615 which, relevant to the discretionary action of a local legislative body, said "even though exercised in an arbitrary and capricious manner, we do not review it." We hold only that neither the Fifth nor Fourteenth Amendments to the United States Constitution required that the Grand Rapids City Commission hold a full "due process" hearing to consider plaintiff Lewis' request for the transfer to him of a license then owned by another.

The Michigan legislature recognized a difference between issuance of a new license and revocation of an existing one. While Section 17 of the Act, M.S.A. 18.988, originally provided that upon request of a local legislative body, "the Commission shall revoke the license of any licensee," such section was amended in 1957 to provide that a request for revocation was to be made "after *due notice and proper hearing* by the body." (Emphasis supplied.) Such requirement, however, was not made applicable to approval of the transfer of a license.

It is not necessary that we express agreement with the holding that "a license is not property within the meaning of the due process clause." *Johnson v. Liquor Control Commission,* 266 Mich. 682, 687. Plaintiff Lewis did not own a license to operate a liquor establishment, and the opportunity to seek approval to become an owner was not, in our view, a property right.[4] Such holding is consonant with our decision in *Glicker v. Michigan Liquor Control Com'n.,* 160 F(2) 96 (CA 6, 1947) where we said that "The right to a license to sell intoxicating liquor is not a natural right, nor a privilege incident to national citizenship." Michigan's view that the character of the liquor business permits greater latitude in the means of its regulation than in the controls applied to other activities was paralleled by the United States Supreme Court in *Crowley v. Christensen.* 137 U.S. 86, 34 L. Ed. 620 (1890). The Court there said,

> "There is no inherent right to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the government authority. That authority may vest in such officers as it may deem proper the power of passing upon application for permission to carry it on, and to issue licenses for that purpose."

Although the *Crowley* case on its face appeared to hold that liquor licensing was even outside of the equal protection clause, this was not necessary to the decision, since, as the court noted, the city in its return had alleged certain criminal violations, which, while never raised at a hearing (there having been none) ". . . were a sufficient indication of the character of the place in which the business was conducted for the exercise of the discretion of the police

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[4] Instructions to applicants for a license transfer carry the large block letter legend "Do not invest any money or commit yourself by any binding agreement in the expectation of receiving a license until you are officially notified of the approval."

commissioners in refusing a further license to the petitioner." The only inescapable rule of *Crowley* is that the denial of a hearing, in itself, would not violate the Fourteenth Amendment. Such a position is entirely consistent with the decisions of this Court in the instant case and in *Glicker v. Michigan Liquor Control Commission, supra.*

Indeed the District Judge here recognized the rules we speak of when he said,

> "We recognize that the Michigan Supreme Court and the courts of the other states have held consistently that the due process clause of the United States Constitution does not apply to matters concerning liquor licenses." 222 F. Supp. 384.

Such observation conforms to the great weight of authority. Anno. 35 ALR(2) 1067. We, however, read his opinion as holding that all such decisions are now in conflict with today's view of the reach of the Fourteenth Amendment.

The United States Supreme Court, in recent decisions, has been exacting in its requirement of due process before a state agency may deny entrance of citizens into the practice of a profession or other calling, such as the practice of law, *Schware v. Board of Bar Examiners,* 353 U.S. 232, 1 L.Ed.(2) 796 (1957); *Willner v. Committee on Character and Fitness,* 373 U.S. 96, 10 L. Ed.(2) 224 (1962). None of these decisions, however, can be read to control the case of an application for transfer of a liquor license. The traditional municipal interests in regulating the liquor business, together with the problems of conducting this regulation through competent, civic-minded, part-time officials, require the use of flexible procedures. These exigencies of city management must not be disregarded by ordering that plaintiff Lewis, and everyone else wishing to become a transferee of a liquor license, receive a process including "* * * *actor, reus, Judex,* regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings." *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895, 6 L. Ed(2) 1230 (1961). While we hold that such kind of due process did not have to precede the denial of the transfer to Lewis, the evidence

makes clear that he was given repeated hearings with opportunity to present and argue his own position. The things which made him unacceptable as a transferee — the tax delinquencies and the closing of the bar — the history of gambling — a generally poor operation under his management — and his relations with his client, highlighted by his lawsuit against her — were known to him and to the Commission. Although not set in a formal charge, they were the subject of much discussion.[5]

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[5] These excerpts from the Safety Committee members give an idea of what went on.

Commissioner Jamo described Lewis' conduct: "We never seemed to get to the meat. We always went round and round. You were there and we figured today you are going to bring up your testimony and we will get this resolved. You never seemed to touch on the point we were talking about."

Commissioner Lamberts testified to discussions, in Lewis' presence, at the Safety Committee hearings and which exhibited Lewis' attitude toward his own responsibilities: "On some occasions he would say that he was not — he had no responsibility for the fact that the bar was losing money, the fact that the taxes were not paid, the fact that a gambling operation had been going on in that bar. He had no responsibility for the things that went wrong."

"Q. And was there discussion then among the Committee members with and in the presence of Mr. Lewis with reference to what his responsibilities in the bar were and had been?

"A. Yes. We discussed that with him. We talked about the taxes, I think, at every meeting in which he was in attendance. He said he acquired the personal property through a tax sale for $50.00 * * *. So he said he owned the personal property. The personal property taxes had not been paid * * * since the bar had opened in '59. The sales taxes he said were her responsibility and the income taxes were her responsibility * * *. We discussed that he was the manager and he declared he had no responsibility to see that * * * any of the taxes were paid.

"Q. * * * With reference to gambling, what discussion, if any, was there with reference to it?

"A. Lewis said that one of the excuses that the Chief gave for holding up the approval of his license was that there was a violation pending relative to gambling."

Commissioner Barto testified concerning the involved Safety Committee meetings: "Lewis was recognized and heard repeatedly and allowed to make statements with reference to his position on any and all matters that were brought up."

Commissioner Vandenberg talking of the July 24, 1962, meeting of the Safety Committee and of the fact that Lewis was given, and used, opportunity to speak, said: "Mr. Lewis had voluminous documents with him. He referred to these documents frequently and I think Mr. Lewis had a long time in which to present his position."

Commissioner Sevensma testified to talking to Lewis between meetings of the Safety Committee: "I had asked you [Lewis] some time after the January 16th meeting * * * I said; 'This is a very involved matter and has many complications and I would advise you, Mr. Lewis, that you should sit down and write in plain Anglo-Saxon words an exact and detailed chronology of what had happened in the case, beginning at the beginning and right up through the time when the Safety Committee was considering the matter.' However, you [Lewis] chose not to do so."

Commissioner Sevensma's testimony that Lewis' lawsuit with his client was disclosed at the January 16, 1962, meeting and that adjournment was had to allow investigation of the case, is agreed to by Lewis. Sevensma testified to what he found from examining the Circuit Court file.

Lewis contended that a plea of guilty to possession of gambling equipment at "58-60 Ionia Ave." was not proof that Barnett's Bar, located in the building carrying such address, was the site of, or involved in, the "numbers" enterprise. Except for that, neither at any hearing before the Safety Committee, at any of the revocation hearings or at the trial of the case at bar did Lewis make substantial contest of the underlying truth of the events detailed herein and which prompted the Commission's disapproval of him

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5 (Continued)

"Mr. Lewis indicated on January 16, 1962, that he was then and had been for some time the manager of this bar; that he had a management agreement with Patricia Ettress and also that he was her attorney.

"So in examining the Circuit Court record, I was particularly interested in seeing what allegations were made in reference to what I deemed to be a supposedly conflict of interest that he had, where on the one hand he was the manager and on the other hand he was the attorney, and then in this Court action he was suing his client and the licensee.

"And so I ascertained from Paragraph 2 of the Bill of Complaint that Dr. English had entered into a contract in November of 1960, with Patricia Ettress for the purchase of this business and that later on, in May of 1961, Mr. Lewis had acquired a one-half interest in this contract.

"I further noticed * * * that the defendant, Patricia Ettress, had requested the Liquor Control Commission to withhold this transfer for the reason that her debts were greater than the amount that she was going to receive for the business and the transfer of the license, and I recall that on January 16th Mr. Lewis was asked about that, what monetary consideration was involved, and he stated that the price was $18,000.00, but that Patricia Ettress was indebted to him on various items, attorneys fees and other expenses, although I do not recall that he at that time presented an itemized listing of these debts, but anyway the statement was made that the amount of her debt to him was $18,000.00, and that the one would cancel the other, and immediately I wondered about that. * * *

"I also noticed the matter of unpaid taxes, as related in Paragraph 5; that the Federal Taxes had not been paid, and I believe that I learned subsequent to my examination of this Bill of Complaint that there were not only income taxes of Patricia Ettress but also withholding taxes that had not been paid.

"And then the further examination showed that Mr. Lewis was the manager of this business; that he had advanced apparently certain sums of money to pay the debts and obligations of the business. And so after reading those items which appeared in Paragraph 6 and 8, and then also reading Paragraph 9, that the defendant was indebted to him, I might say that my suspicion as to the correctness and the ethics of this matter were confirmed by what he had told us on January 16th and what appeared in the Bill of Complaint, and it seemed to me that he, that is, Mr. Lewis, stood in an untenable position.'

Dr. English, present with Lewis at the next to the last meeting on the matter, said "I remember Mr Vandenberg saying that this woman, this Mrs. Ettress, was losing her legacy and he was interested in protecting her legacy. That was *one of the things* that I remember * * *. Mr. Vandenberg seemed to be very perturbed. The only thing that seemed to worry him was Patricia Ettress losing her legacy." He also remembered Chief Johnson saying to Lewis that he "didn't have the right temperment * * * to run a bar."

as a transferee. Whatever explanations he offered at the trial had already been made to the Safety Committee. He has not told what evidence he would, or might have offered or developed, if a more formal type of hearing had been held.

All of the foregoing is not to say that if denial of Lewis as a transferee was the product of racial bias or other discriminatory motive, he would be without remedy in a Federal Court. If he was a victim of such motivation, then indeed he was denied the equal protection of the law guaranteed to him by the Fourteenth Amendment.

The District Judge and Lewis rely on our decision in *Glicker v. Michigan Liquor Control Commission,* 160 F(2) 96 (CA 6, 1947) and read it as holding that the City Commission or the Safety Committee was required to hold a full dress, adversary hearing before denying approval of a transfer to Lewis. *Glicker* did not so hold and we decline to do so. We there announced that the Michigan Liquor Control Commission could not, under guise of regulating the liquor business, deny its citizens *equal protection of the law.* The case came to us on appeal from a District Court order granting a motion to dismiss a complaint which *inter alia* charged that the Commission's action in suspending an existing liquor license,

> "*was intentional and deliberate discrimination* against her on account of political reasons and was done deliberately *for the purpose of treating the appellant in a different manner than any other owner of a Class C liquor license,* and was in violation of her rights under the Fourteenth Amendment of the United States Constitution and Section 1979 of the Revised Statutes of the United States, Title 18 U.S.C.A. 343." (Emphasis supplied.)

The above allegations had to be accepted as true on motion to dismiss and we held only that the described conduct amounted to denial of equal protection of the law. We took occasion to say:

> "The business [selling of liquor] being one which admittedly may be dangerous to public health, safety and

> morals * * * the scope of the legislature's power to regulate it is much broader than in the case of its regulation of an ordinary lawful business essential to the conduct of human affairs."

and the scope of our holding is made clear by our conclusion that,

> "In considering the motion to dismiss, we are controlled by the allegations of the complaint. It specifically alleges that the Commission acted 'unlawfully, fraudulently, willfully and illegally' and 'intentionally and deliberately discriminated against' her, and that its action was wilful, deliberate and intended for a political purpose * * * and that the revocation of her license 'was done purposely and with the thought of treating this plaintiff in a different manner than any other owner of a Class C liquor license.' *We believe that those allegations are sufficient to state a cause of action under the equal protection of the Fourteenth Amendment* * * *. Whether or not the proof * * * will sustain such allegations is a different question."

The case of *Hornsby v. Allen,* 326 F(2) 605 (CA 5, 1964) was decided after the District Court's opinion in this case was announced. It is relied upon by appellee for his contention that full due process had to be afforded before denial of the transfer. This, like our *Glicker* case, involved the review of the dismissal on motion of a complaint which charged unconstitutional denial of an application for a liquor license. It charged that such denial was "without reason therefor" and was "arbitrary, unreasonable, unjust, capricious and discriminatory." Thus the matter was before the Fifth Circuit with the foregoing allegations admitted. The Court said that "the trial Court must entertain the suit and determine the truth of the allegations." The cause was remanded for trial. This case, however, comes to us after a full and extensive trial in which the reasons for denial were fully exposed. We rec-

ognize some observations in the *Hornsby* case as being at odds with our conclusion and to that extent we decline to follow it.

2. Denial of Equal Protection.

We come then to the question whether as a matter of fact plaintiff Lewis was denied a transfer because he was a negro or was otherwise discriminated against. It was his burden to prove his charges in this regard. The District Judge's opinion must be read as a factual finding that Lewis made out such a case. We are of the opinion that such findings were clearly erroneous. Fed. R. Civ. P. 52(a). We so hold, applying the rule of *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 92 L. Ed. 746 (1947) that,

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." See also *Commission v. Duberstein,* 363 U.S. 278, 291, 4 L. Ed. (2) 1218 (1960).

It is our belief that the District Judge gained an early but erroneous impression that plaintiff Lewis was the victim of racial bias. We are persuaded, however, that his worthy zeal to vindicate Lewis' constitutional right not to be so victimized, led him to inferences that are, on the record of this case, unsupportable.

A. Racial bias.

At an early pretrial conference, the District Judge remarked "'this is a civil rights case.'' He remarked, "there is not any question about it that this license should continue as a negro operated licensed establishment." The following excerpts from the District Judge's opinion and trial observations portray his conclusion of racial bias

and we set them out with our reasons for considering them invalid. (Emphasis is supplied in the quotations.)

1) "This action involves the denial of a * * * of the only *negro owned-operated* Class C liquor license in a city of over 200,000 population." (222 F. Supp. 352)

"There are only three liquor establishments in the City of Grand Rapids *owned by negroes* * * *." (222 F. Supp. 381)

"* * * you have only three *negro* establishments in a city of 200,000. *You have an intensity of surveillance of this establishment.* Now if this license goes in escrow, it could very well be the end of the license. Then you have two establishments, colored establishments for a city of 200,000. This is one of the things that has been *predominant and very conspicuous* in this case." (105a, 117a, 118a)

We immediately note that there is no evidence that any other negroes had ever applied for and been denied the right to engage in the liquor business. A transfer from one negro licensee to another was once denied, but the reason therefor was not explored.

The involved license had long been owned by negroes and notwithstanding its earlier revocation by the liquor Control Commission (not the Grand Rapids authorities), the license was restored to Patricia Ettress, the 23 year old negro heir of her father. Because the Liquor Control Commission did not consider this young lady qualified to manage a bar, the restoration was conditioned upon a negro, plaintiff Lewis, acting as manager. A management agreement was urged and approved by the Grand Rapids Police Department. Of such agreement Lewis said, "This is the only case, by the way, where the police department approved a management agreement." This was in 1959, prior to the troubled history of the bar under Lewis' management.

2) "All three of these liquor establishments are located in Commissioner Lamberts' ward. *She wanted Barnett's Bar closed.* She intended to eliminate the only Class C liquor license *owned by a negro* in the City of Grand Rapids, a city of over 200,000 population." (222 F. Supp. 381)

Such inference is without support in the evidence. It is not disputed that all of the City Commission, including Mrs. Lambert's, were agreeable to and urged transfer of the Barnett license to Dr. English, Lewis' partner and himself a negro.[6] Mrs. Lamberts comes in for rather special condemnation by the District Judge. It cannot be denied that she took her responsibilities seriously and perhaps pursued them with vigor unwonted in municipal officers. It is a fair inference too that along the route of Mr. Lewis' frequent appearances before the Safety Committee, she developed a lack of confidence in his ability to properly manage a bar as a sideline to his law practice. The District Judge supported his indictment of Mrs. Lamberts by noting his observation of her demeanor on the stand. He emphasized "the very saucy tone of her voice," and that she had stuck out her tongue, and had otherwise employed "facial grimaces" to evidence her displeasure. Certainly we do not condone such conduct. We think it proper to observe, however, that such conduct happened during the course of a cross-examination running through several days. Her cross-examination by Lewis was vigorous, with repetitive and unfounded suggestions of derelict conduct by the witness, and covers some 248 pages of transcript. While we may not approve, we easily understand the described facial expressions with which Mrs. Lamberts reacted to her long ordeal — defensive weapons not uncommon to the badgered female. However, they do not prove nor justify an inference of racial bias. It may be relevant to here mention that the trial of this case consumed some 16 trial days and generated a transcript of 1,895 pages, over half of which is made up

[6] Dr. English is not a party to this lawsuit.

of Lewis' cross-examination of the Chief of Police and the members of the City Commission. Pretrial hearings are reported in 333 pages of transcript, and there is a supplemental transcript of 201 pages. The District Judge established a segregated record containing some of the defendants' evidence of reasons why it was considered inappropriate to approve Lewis as a transferee. The District Judge was of the view that such evidence was immaterial except to the extent that the thinking of the Commissioners had been communicated to Lewis. The District Judge would not receive evidence offered to prove that Lewis knew of the numbers gambling going on in Barnett's Bar. He so ruled because it was not shown that those who claimed to know of Lewis' knowledge had told the police about it, and no showing was made that the Commissioners had told Lewis that they had evidence that he knew of the gambling.

3) "Mr. Lewis, Barnett's Bar, and all who were associated with it; were made to appear to represent all that was undesirable in taverns and licensed liquor establishments, and especially, *with varying inflections of overtone, a Negro bar.*" (222 F. Supp. 382)

"It is important to bear in mind that insofar as the *Negro population* of the City of Grand Rapids is concerned it comprises about 7% of the population. *In Commissioner Lambert's and Jamo's political calculation this was a negligible force which could be disregarded.* Their activities in the case here at issue were before Birmingham." (222 F. Supp. 382)

"There existed in fact a conspiracy on the part of Chief Johnson and Commissioners Lamberts, Sevensma and Jamo to defeat and deny the transfer and ultimately to revoke the *only Negro-owned Class C liquor license* in a city of over 200,000 population. (222 F. Supp. 382).

The foregoing subjective inferences are invalid and without evidentiary support. There is no evidence that the

Negro population of Grand Rapids was desirous of increasing its share of the city's liquor establishments. Invidious discrimination cannot be postulated whenever or wherever a city exists in which the ratio of negro-operated bars to the total number of such businesses is less than the Negro percentage of population. The assertion that Commissioners Lamberts and Jamo politically calculated that this (the ratio of negro-operated bars to the total Negro population) "was a negligible force which could be disregarded" is entirely gratuitus. We find no evidence from which to infer the "political calculation" recited; Mrs. Lamberts became acquainted with Lewis through their being coworkers in the Democratic Party. Commissioner Jamo had received a commendation from the NAACP for his testimony before the state legislature in 1960, then serving as Chairman of the Kent County Civil Rights Committee of the Republican Party.

4) . "Chief Johnson was determined to keep the only *negro-owned* Class C liquor establishment closed." (222 F. Supp. 359)

"Chief Johnson wanted to close Barnett's Bar, the lone *negro-owned* Class C. liquor license in Grand Rapids." (222 F. Supp. 375)

As Chief of the Grand Rapids Police Department, Johnson had approved the reopening of Barnett's Bar in 1959 after a previous bad record. The approval was signed by Chief Johnson upon condition that Lewis, a Negro, take over its management. It is a fair inference that Chief Johnson's estimate of Mr. Lewis' qualifications as a bar manager deteriorated as the bar's trouble mounted thereafter. As in the case of Mrs. Lamberts, the District Judge supports his charge of malice against the Chief by reference to his witness stand demeanor. "He testified with great difficulty; he was quickly exasperated and clipped off his answers. When extensive questions were asked by Mr. Lewis, the Chief grew redfaced and tight lipped; the blood vessels in his head bulged out." 222 F. Supp. 373.

The Chief may have remembered Lewis calling him a liar at one of the Safety Committee meetings. Lewis' cross-examination of the Chief covers 133 pages of transcript; it contains unfounded charges of official misconduct, as well as unsupported reflections upon the Chief's personal life. Perhaps the Chief should have better controlled his emotions, but his very natural responses under attack do not convict him of conspiracy, malice, or racial bias.

> 5) "Dred Scott Madison [*a negro police officer*] claimed that Chief Johnson practiced discrimination and cited his own demotion as evidence of this discrimination." (222 F. Supp. 370)

This officer testified: "I couldn't believe that he [Chief Johnson] was biased against me himself." He did not cite his own demotion as evidence of racial discrimination by Chief Johnson. He did state that negro officers were constantly "at the bottom of the list" on efficiency ratings. However, Chief Johnson did not control the efficiency ratings and in all events the official and not questioned records of the efficiency ratings ranked officer Madison himself as number 21 out of 62, far from the bottom of the list. The Chief gave the reason for the demotion of Madison and its validity was sustained by the Civil Service Board. It was shown that the negro officer, Madison, was, upon the recommendation of Chief Johnson, promoted to the rank of Sergeant, bypassing several white officers with greater seniority.

> 6) "The court's discussion of gambling need not be repeated here. The actions of the city police in this regard constituted a *discriminatory enforcement of the gambling laws* against a licensed liquor establishment." (222 F. Supp. 382)

The investigation of gambling at Barnett's Bar was the product of the voluntary action of the negro officer Madison, without previous knowledge of or request from the police department. Discovering or suspecting the gambling, he reported it; this was followed by a customary police

practice of bringing in an officer from another city, and the officer selected was a negro. After several days of surveillance, he reported that the "numbers racket" was going on at Barnett's Bar and swore to a complaint that named individuals who were carrying on such an enterprise. We cannot join the District Judge's trial characterization of this as "an intensity of surveillance of this establishment." Some of these charges pended for over a year, Lewis appearing for all defendants; they were concluded by a plea of guilty by one of the accused to possession of gambling paraphernalia at "58-60 Ionia Ave." This is the address of the building where the bar is located, and was used in official papers as the address of Barnett's Bar. The District Judge infers that the bar was not involved, but the plea of guilty does not exclude it. The Liquor Control Commission's file contains a report of "Items confiscated from 58-60 Ionia Ave. during the Numbers Raid of 8-5-60." The report mentions torn numbers slips and adding machine tapes — indicia of the "numbers racket" — found on the main floor of Barnett's Bar, in its office wastebasket, and in the trash barrel at the rear of Barnett's. Numerous other items of relevant paraphernalia were reported as seized at 58-60 Ionia, without specification as to whether they were in Barnett's Bar. "Five Green Sheets [familiar to the numbers game] for the week ending 8-4-60" with other material were reported as taken from the office located in the "basement of 58-60 Ionia, S.W. under Barnett Bar." We do not understand how the bar was excluded from involvement. The District Judge's impression of "undue surveillance" may have arisen from lack of evidence of like surveillance or raid of any other bar. There was, however, no evidence that any other bar had been suspected as a base of operations for the "numbers racket". Both the Chief and officer Madison told of raids on gambling establishments — gaming rooms — and the arrest of their white patrons.

We conclude consideration of racial bias by mentioning that the original complaint filed in this cause on November 19, 1962, made no such claim. It was brought into the case by an amended complaint filed on January 2, 1963.

B. Other discrimination.

The District Judge inferred malice and conspiracy from other conduct which he does not specifically relate to racial bias. With repetitive vigor he indicts the entire City Commission of Grand Rapids, with the exception of the Mayor.[7] Although the evidence does not disclose their content, the news media, radio, TV and newspapers are alleged to have carried stories so extensively "and it was the purpose of Chief Johnson and Commissioner Lambert to cause the result — that Barnett's Bar became synonymous with all that is undesirable in liquor establishments and especially a *negro-owned-operated* liquor establishment. Barnett's Bar and Alphonse Lewis as a consequence *are unpopular in the community.*" (Emphasis supplied.) (222 F. Supp. 383) Without relevant record evidence, we are unable to probe the community mind of Grand Rapids. The District Judge hypothesizes that because of what happened, if a popular vote were held on the question "Shall Barnett's Bar license be revoked?" the vote would be overwhelmingly in the affirmative. (222 F. Supp. 383).

Mrs. Lamberts was found to be the chief offender, with other members of the Commission succumbing to her persuasion. The District Judge concluded that:

> 1) "Her [Lamberts'] rise to Chairman of the Safety Committee and President of the City Commission, *and the evident voting block which she had acquired in the City Commission* gave her substantial power which she wielded arbitrarily, capriciously, and unreasonably in this instant case." (222 F. Supp. 381)

Mrs. Lamberts was not Chairman of the Safety Committee at the time of events here involved. If there is any support for the assertion that Mrs. Lamberts "had acquired" a voting block which "gave her * * * power which she wielded arbitrarily," etc., it must be found in the following:

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[7] The Mayor was not present at any of the meetings of the Safety Committee or the Commission at which the transfer was considered and voted on.

"Q. * * * isn't it true that there is a faction * * * of which Mrs. Lamberts *is a part* which controls at least four votes * * *?

"A. Well, sometimes I think so, *sometimes* I don't."

In quoting from the foregoing (222 F. Supp. 371) the District Judge assumed that the question was whether Mrs. Lamberts *controlled* the faction, not whether she was *a part of* a faction. The last part of the answer, "sometimes I don't" is omitted. The same examination went on to inquire whether the Commissioners from Mrs. Lamberts' ward and another ward did not always vote on the same side. The answer was, "I wouldn't say so." We find without support the District Judge's further inference that the City Commission "was under her [Mrs. Lamberts'] dominating control insofar as this transaction was concerned."

2) "The Court is also aware of one time * * * when Commissioner Lamberts chose to demonstrate her *omniscient attitude* by expostulating that a certain question 'was not worthy of answer.'" (222 F. Supp. 375)

The question which provoked the quoted answer is not set out. It came during plaintiff Lewis' cross-examination of Mrs. Lamberts. It was "In other words, if you want a liquor license don't say anything bad about the police, is that right?"

3) "When she [Mrs. Lamberts] phoned the LCC * * * she told them there *was going to be a grand jury investigation* of this transaction." (222 F. Supp. 381)

A memorandum in the Liquor Control Commission records, unidentified as to authorship, referred to a call from Mrs. Lamberts (this was in October, 1962, long after denial of the transfer) wherein she allegedly stated "that the county prosecutor *is thinking about* asking for a grand

jury investigation * * *." The prosecuting attorney testified that he had not told Mrs. Lamberts that he was going to call a grand jury *to investigate the Liquor Control Commission,* but said that he had discussed with the Chief of Police the possibility of petitioning for a grand jury "to investigate all of Barnett's Bar affairs, not Mr. Lewis or his connection with it." He never did so, however. Mrs. Lamberts testified that she had heard of this talk from Chief Johnson.

> 4) "When Commissioner Sevensma on cross-examination was informed *of the facts* in the alleged gambling cases, he stated that if he had known these facts, his judgment about the case *would* have been different." (222 F. Supp. 373)

Commissioner Sevensma did not so testify. Mr. Lewis' questions contained Lewis' hypothesis of facts which he contended would have failed to establish that there was gambling in Barnett's Bar. Asked if he knew such to be the facts, would his judgment have been different, Sevensma answered "I would say yes, *perhaps* it would have been different * * *. It *might* have been different."

We find other factual inferences by the District Judge which, in our view, are without substantial evidentiary support. We forego, however, further extension of the subject. All who questioned Mr. Lewis' conduct were accused as conspirators. An investigator for the LCC who was dissatisfied with Lewis' cooperation was included. "Mr. Arens [LCC investigator for the State] knew, understood and participated in Chief Johnson's programme of delay and denial."[8] (222 F. Supp. 362) All of the condemned City Commissioners were responsible, reputable citizens, elected and re-elected by the people of Grand Rapids. Mrs. Lamberts, the most seriously accused, had taken the trouble to consult with a Dr. Cowles, a negro

[8] The Internal Revenue Service is accused in Lewis' complaint which alleges "* * * despite said sale [by which Lewis obtained title to the bar fixtures for $50.00] said Internal Revenue Service has failed, refused and neglected to remove a so-called 'stop' request filed with the Michigan Liquor Control Commission."

member of the city's Human Relations' Committee, upon the subject of Mr. Lewis' application for transfer. Development of the subject, however, was foreclosed by its exclusion as hearsay.

We believe that Mr. Lewis' record of management of Barnett's Bar and his handling of his client's affars was such that it cannot be said that denial of the transfer was arbitrary, capricious or discriminatory. Commissioner Sevensma, a graduate of the University of Michigan and a practicing lawyer of upwards of twenty years, when pressed by Lewis to tell why he questioned Lewis' handling of his client's affairs, answered "there was definitely a conflict of interest * * * you were the manager, you were the lawyer, you were the creditor, you sued your own client and the licensee."

Commissioner John Vandenberg, a graduate of Calvin College at Grand Rapids and now a professor of economics there, an M.A. and Ph.D graduate of and now a part time teacher at the University of Michigan, was elected in 1960, and was a member of the Safety Committee which recommended denial of transfer. He stated,

> "I had no bias toward Mr. Lewis and I had no bias toward anyone. This is against my own personal philosophical and religious commitments; this was against my commitment to the City which I made when I was sworn in as a City Commissioner to protect the rights of all the citizens of the Community * * *."

He testified that Mr. Lewis was given and employed ample opportunity to present his position to the Safety Committee. He disclosed the reasons which prompted his vote to deny the transfer as follows:

> "I was astonished to have before me a man who, one, first was legal counsel to the licensee, Mrs. Bell,[9] two, who then became manager of the bar, which she had acquired by virtue of the death of her father

[9] Patricia Ettress had become Mrs. Bell during the time involved.

> * * *. Three, who was in court on the same case. Four, who was trying to acquire this and there would be no payment for Mrs. Ball. I cannot conceive of a situation where one person can be in so many roles which are obviously in conflict. * * *
>
> "For someone to be in management position and in the period of approximately 18 months to see an asset which is alleged to have been worth from $18,000 to $25,000 turn out to be worth nothing, leads me to suspect that the person who is managing that bar is incompetent, or dishonest, or he is more interested in himself than he is in his client. This was the chief reason why I could not see transferring this particular license to Mr. Lewis.
>
> "In addition to this, we have other matters such as the infraction of the law; we have the recommendation of the Chief of Police; we have the fact that taxes were not paid. All these together could only convince me that this would not be for the welfare of the City to make this transfer. * * *
>
> "It was my opinion that Mr. Lewis, because of these many roles, the law infractions, and the recommendation of the Chief, the failure to pay taxes and being in control, as he repeatedly said to us he had the power of attorney, he could hire, fire, he ran the bar and having done such a poor job, in the background of all these roles, I, in good conscience, could not vote for that transfer."

Mr. Vandenberg was not sure as to how much of his reasoning was explicitly addressed to Mr. Lewis although he recalled giving some of them to him.[10] He questioned the

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[10] There can be little question, though, that these matters were before the City Commission on July 31, 1962, when the transfer application was denied. It was so testified by Commissioners Barto, Jamo, Sevensma and Vandenberg. There was no attempt to refute any of this testimony except for the District Court's observation that because all the Commissioners agreed, all of their testimony was questionable. 222 F. Supp. 372

policy of public announcement of all of such reasons. He said,

> "Mr. Lewis is a public figure. He is an attorney and as such I think he has a perfect right to go about his business as a lawyer. I think that Mr. Lewis would have been damaged had we expounded in great detail on this particular request, giving the reasons why we did not transfer his license. I have given those by request in this courtroom. I have never given these publicly any other place."

To sustain a finding that denial of Lewis' application was the product of racial bias or other discriminatory motive would require us to leave unreversed a holding that Commissioner Vandenberg's above recital was but a perjurious mask[11] to hide his real and vicious motives. We cannot do so. Neither can we discern any basis for the enormous immorality and malfeasance attributed to the other Commissioners by the District Court. These others, of varying professions or means of livelihood[12] were of equally responsible standing and there was nothing in their backgrounds to forecast their capacity for the vicious conduct of which they were convicted. It is significant indeed that plaintiff Lewis does not deny the factual high points of his management of Barnett's Bar and his client's affairs which, justifiably in our view, led an entire City Commission to find him unsuited to manage or become the licensee of Barnett's Bar. Even though this history

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11 The District Judge characterized the reasons given by Vandenberg and the other Commissioners as "a facade for the reasons behind the action of the Safety Committee and the personal and racial discrimination of Chief Johnson." (222 F. Supp. 383)

12 Commissioner Lamberts is the wife of a neurological surgeon of Grand Rapids and herself a graduate of the University of Michigan School of Nursing; Commissioner Barto is a mortician, at one time a liquor licensee and had been a member of the Commission for 15 years; Commissioner Sypniewski had been a member of the Commission since 1960 and was Sales Manager of a business concern of statewide coverage; Commissioner Jamo owns his own business involving the selling of vacuum cleaners and sewing machines, a 35 year old economics graduate of the University of Michigan, president of the local chapter of the alumni of that school, and as stated, the recipient of a commendation by the NAACP for his work in its behalf; Commissioner Sevensma was shown to have been an active worker for the election of a Negro, Judge Letts, who was elected a judge of the Municipal Court over opposing white candidates.

may have caused some personal dislike of Mr. Lewis that, by itself, does not add up to a denial of equal protection of the law. That no Commissioner had any beginning opposition to Mr. Lewis, racial or otherwise, is shown by the following excerpt from his cross-examination:

> "Q. And looking back at it now, even as of this date, do you assert there was any antagonism toward you by any of the members of that committee as of that date, January 16, 1962?
> "A. No."

We make clear just what we decide.

1. Plaintiff Lewis was not, under *Glicker v. Liquor Control Commission,* 160 F(2) 96 (CA 6, 1947) entitled to a full dress, trial type, hearing on his application for transfer, he was not deprived of any federally granted constitutional right by the manner in which such application was considered and approval withheld.

2. Plaintiff Lewis was, under *Glicker* and other authorities, entitled to the "equal protection of the law" guaranteed by the Fourteenth Amendment.

3. If denial of Lewis' application for transfer was the product of racial bias or other discriminatory motive, such denial would be a deprivation of the equal protection of the law.

4. The District Judge's findings as to racial bias and discriminatory motive on the part of the Grand Rapids City Commission are clearly erroneous, within the meaning of Rule 52 Fed. R. Civ. P. as the term "clearly erroneous" has been articulated by *United States v. U. S. Gypsum,* 333 U.S. 364, 375, 92 L. Ed. 746, 766 (1948).

5. We do not reach the question of whether Lewis or the trustee in bankruptcy were denied due process or equal protection of the law by the revocation of the license for Barnett's Bar. The appeal does not present such question.

The judgment of the District Court as it conflicts with this opinion is reversed; the cause is remanded to the District Court with direction to vacate its order setting aside the July 31, 1962, resolution of the Grand Rapids

City Commission denying approval of the Lewis application for transfer and with direction to dissolve the mandatory injunctive order requiring the City and its Chief of Police to approve a transfer to Lewis of the involved license.

The judgment of the District Court is, to the foregoing extent, reversed.

EDWARDS, Circuit Judge, concurring. For the reasons stated in the five numbered paragraphs at the conclusion of the court's opinion, I concur in the decision set forth thereafter.

JUDGMENT
(Filed February 16, 1966)

No. 15669

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALPHONSE LEWIS, JR.,
Plaintiff-Appellee,

vs.

CITY OF GRAND RAPIDS, MICHIGAN, ET AL.,
Defendants-Appellants.

BEFORE: O'SULLIVAN and EDWARDS, Circuit Judges, and CECIL, Senior Circuit Judge.

APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for further proceedings in conformity with the opinion.

It is further ordered that Defendants-Appellants recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

Carl W. Reuss
Clerk

Issued as Mandate: April 18, 1966
COSTS: To be recovered by Appellants

Filing fee	$25.00
Printing	$ .....
Total	$25.00

ORDER DENYING PETITION FOR REHEARING
(Filed April 7, 1966)

No. 15669

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALPHONSE LEWIS, JR.,
Plaintiff-Appellee,

vs.

CITY OF GRAND RAPIDS, MICHIGAN, ET AL.,
Defendants-Appellants.

BEFORE: O'SULLIVAN and EDWARDS, Circuit Judges, and CECIL, Senior Circuit Judge.

THIS CAUSE is before the Court upon the petition of the plaintiff-appellee for rehearing, and upon due consideration thereof,

IT IS ORDERED that the said petition for rehearing be, and it is, hereby denied.

Entered by order of the Court.

Carl W. Reuss
Clerk

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 353

ALPHONSE LEWIS, JR.,
Petitioner,

vs.

No. 15,669

CITY OF GRAND RAPIDS, MICHIGAN, WILLIAM A. JOHNSON, Superintendent of Grand Rapids Police Department, their commissioners, officials, officers, attorneys, agents, employees and any others acting for, with or in concert with any of them, et al.,
Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 353

ALPHONSE LEWIS,
Petitioner,

vs.

CITY OF GRAND RAPIDS, MICHIGAN, et al.,
Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent prays that a writ for certiorari to review the judgment of the Court of Appeals for the Sixth Circuit be denied.

CITATIONS TO OPINIONS BELOW

Reference is made to the Appendix to the petition for the opinion of the District Court (Appendix B pages 1c-84c) and reported at 222 Fed. Supp. 349. Reference is made to the Appendix to the petition for the opinion of the Court of Appeals (Appendix C pages 85c-123c) and reported at 356 F. 2nd 276.

Petitioner having represented that he has furnished 9 copies of the record the respondent will make use of the same record as filed with the court.

QUESTIONS PRESENTED

I. Was The Local Legislative Body Required To Provide Petitioner A Full Dress, Trial-Type Hearing On His Application For A Liquor License Transfer?

II. Are The Provisions Of The Michigan Administrative Code And The Michigan Administrative Procedures Act Applicable To A Local Legislative Body In Its Handling Of Liquor License Transfer Applications?

III. Were The Reasons For The Denial Of Petitioner's Application For A Liquor License Transfer Arbitrary, Capricious Or Unreasonable So As To Deny Petitioner Equal Protection?

IV. Was The Court Of Appeals Correct In Holding The Factual Findings Of Discrimination By The District Court To Be Clearly Erroneous?

STATEMENT OF THE CASE

The facts of this case are extremely well stated by Justice O'Sullivan in the opinion of the Court of Appeals (356 Fed. 2nd 276 on pages 278-284; and may likewise be found in Appendix C, pages 87c to 99c to the Petition).

Petitioner's "Statement of the Case" contains inaccuracies and omissions which compel this corrected statement.

ALPHONSE LEWIS: ATTORNEY

Petitioner, Alphonse Lewis, Jr., a licensed attorney, holding a political office of the State Public Administrator (41a, 70b) was contacted by one Patricia Barnett Ettress in the year 1959 (62b, 63b). Mrs. Ettress was having problems in securing the restoration of a liquor license to her which had previously been revoked or withdrawn by the Michigan Liquor Control Commission. It had previously been possessed by her stepfather (37a, 62b). Mr.

Lewis, attorney; Mr. Lewis, manager; Mr. Lewis, co-applicant for a liquor license, continued to represent Mrs. Ettress in a variety of capacities from that time (1959) until after he brought suit against her in the Circuit Court for Kent County in December, 1961 (292a-297a).

ALPHONSE LEWIS: MANAGER

Mrs. Ettress was considered to be totally unqualified to operate the bar and the issuance of the license was conditioned upon her obtaining a manager "to operate the establishment" (Ex. 8L, par. 5, p. 277a, 64b). Petitioner, Attorney Lewis then composed a management contract for Mrs. Ettress (his client) to execute which she did on May 20, 1959 (277a, 278a, 64b). Then Attorney Lewis became Manager Lewis for his "client" (100a, 64b). The "Agreement" provided that he (Lewis) would receive substantial percentages from the *gross* income of the bar (278a, 64b). Mr. Lewis continued to practice law throughout this period of time. He certainly was unable and/or unwilling to manage the bar (Ex. P-8L-12, p. 282a). As the licensee expressed it in her October 21, 1961, letter to the Liquor Control Commission, ". . . he wasn't what is referred to as a working manager because he is a attorney by profession law" (Ex. LL at p. 260a). Under the management agreement Attorney-Manager Lewis had full power "to hire and fire employees and had general supervision of all employees" (103a) of the bar.

GAMBLING

Prior to August 4, 1960, while Mr. Lewis was in full charge of all operations, a negro police sergeant, Dred Scott Madison, made a report of suspected gambling at the bar and building in which it was located (234a). The officer discussed the charges with Mr. Lewis (234a). Regrettably, the record does not reflect just how much involved Mr. Lewis was, in the gambling activities at the bar because the trial judge precluded all testimony from the licensee (Mrs. Ettress) on that subject (148a, 149a, 150a, 241a). Police Officer Sylvester Stephens (from the

Saginaw, Michigan Police Department) observed gambling taking place in the bar under the direction of Mr. Lewis' bartender, Dan Bethea (289a, 290a, 291a, 292a). Several arrests were made in a raid conducted by the Grand Rapids Police Department (Ex. 71, 288a-292a). As the result of delay and with the expert guidance of Mr. Lewis, who assumed his role of attorney, all persons were ultimately released except the one person in whom the licensee, Mrs. Ettress, had placed some measure of confidence (40a). Wesley Calloway plead "guilty" upon the advice of his attorney (bar manager) and was sentenced (248a, 249a). It is significant that a Hearing Officer for the Michigan Liquor Control Commission concluded after a "hearing" that "there is no doubt in my mind that there has been some gambling activities in your bar with the knowledge of the bartender" (102a). That Mr. Lewis, as an attorney *successfully* defended the criminal charges against those involved is conjectural. It is to be admitted that attorney Lewis was successful in avoiding prosecution of *himself* as manager.

ALPHONSE LEWIS: PURCHASER

In November, 1960, licensee Patricia was induced to sell the license to a friend of Attorney-Manager Lewis, one Dr. Cortez A. English, a negro dentist (253a). The sale was to be for $18,000 "cash" (251a, 252a). On May 15, 1961, Mr. Lewis (attorney and counsellor for his client Mrs. Ettress) amended the agreement to include himself as a co-purchaser with Dr. English (39a). *Subsequent* to her agreeing to allow her *attorney and counsellor* to purchase from her the one valuable financial asset she still possessed (without any independent counsel or attorney) Mrs. Ettress received an *invoice* for $16,596.15 from her attorney, manager, advisor (and now purchaser), which when combined with "advanced money" by Dr. English totaled $18,516.25 (246a). This shocking duplicity in one in whom she reposed such confidence did not escape Mrs. Ettress (282a) nor did it subsequently escape members of the Grand Rapids City Commission (157a, 169a, 200a).

Mr. Andrew Spyk, Jr., the investigator for the Liquor Control Commission processed the Lewis application with a notation that there was a "violation that was pending against the licensee" (42a). Throughout his 15½ years with the Liquor Control Commission Mr. Spyk observed that the Commission does not approve transfers until violations are cleared up (43a). The same is true of Mr. Arens (113a, 114a, 74b).

There is no statute or regulation requiring the approval of any police officer to effect a transfer in the State of Michigan (42a) and there are instances in which transfers are approved "over the objection of the Police or Sheriff Department (116a). There was no showing that the Police Superintendent was motivated by an attitude of prejudice or discrimination toward petitioner Lewis. In fact, witnesses called by Mr. Lewis at the trial, including Liquor Control Investigator Andrew Spyk and former Prosecuting Attorney Richard Loughrin observed no bias or discrimination by the Police Chief (44a). Likewise no bias or animus toward Mr. Lewis was exhibited by Lt. Sumski of the police force (45a). Mr. Arens of the Liquor Control Commission never observed any bias or animus toward Mr. Lewis (114a). Under the rules and regulations the transfer to petitioner Lewis and Dr. English could never have been effected without the birth certificate of Dr. English which had not even been furnished at the time of the trial of the case (114a).

TAXES

Under the "Management Agreement" prepared by attorney Lewis for his client to sign (which she did), he provided:

(a) That he, Lewis, would receive 10% of the gross profit, (par. II);

(b) That he would have general supervision of the business and "final authority and discretion in all matters relating to the operation of said business". (par. IV);

(c) That he (petitioner Lewis) "*agrees to pay all expenses, taxes and obligations incurred during the operation . . .*" (par. VII). (Ex. H.H. 256a, 257a).

Nevertheless, the taxes were not paid. The Internal Revenue Service placed a "stop order" on any sale or upon its reopening because taxes were due and unpaid (228a). The State sales taxes were not paid (228a). The City property taxes were not paid (45a, 46a). Ultimately the bond was cancelled for nonpayment of premiums (230a). Mr. Lewis, attorney and manager for Mrs. Ettress, purchased his client's "equity of redemption" in the bar equipment at an Internal Revenue Service auction sale held on November 13, 1961 (27a, 250a and Ex. No. 78, par. V, 294a).

LICENSEE REQUESTS RESCISSION

Upon several occasions Mrs. Ettress, client of attorney Lewis, requested rescinding of agreement to sell to Mr. Lewis. By the 10th day of May, 1961, Mrs. Ettress advised her manager:

> "In regard to your managing of the bar. I would like to terminate at the receipt of this letter . . . I do not feel that you are unable to take care of my affairs . . . because of *conflicting* interest. (Ex. RR. 263a).

On October 21, 1961, Mrs. Ettress requested the Michigan Liquor Control Commission to cancel out the proposed sale of the license" . . . because of some things that have happened since that application was first sent in originally . . . I had repeatedly asked him for a final accounting and he gave it to me this summer after I was all ready committed to sell it to him . . . I have never been in business before and that was why the Commission requested that I have a manager . . ." (Exhibit LL, 259a, 260a).

On December 19, 1961, Mrs. Ettress advised the Commission, "That the application of transfer of my license

to Mr. Lewis and Mr. English is hereby canceled . . ." (Ex. II, 257a, 258a).

On December 14, 1961, Mrs. Ettress went to the Grand Rapids Police Station and outlined the sordid history of the attempted transfer by and to her attorney-manager (Ex. GG, 252a 253a, 254a, 255a) under oath.

ATTORNEY VS. CLIENT (LEWIS VS. ETTRESS)

On the 21st day of December, 1961, Attorney-Manager Alphonse Lewis, petitioner herein, commenced legal action against his client, Patricia Ettress, in the Circuit Court for the County of Kent (Ex. 78, 293a-297a). In his prayer, Mr. Lewis demanded the license and that a receiver be appointed (Ex, 78; 296a). At the hearing held on the 26th of December, Mr. Lewis asked that *he* be appointed receiver (178a). For the first time during the period of over two years, Patricia Ettress had her own independent counsel (179a). The Judge questioned the ethics of Mr. Lewis and "indicated from the bench at that time that Mr. Lewis certainly could not expect to be receiver for a client . . . that he was suing" (179a).

The so-called "settlement of the Circuit Court" (1b) did not involve a Circuit Judge at all (20a). It was never approved by a Circuit Judge (81c) but was witnessed by a young attorney (81c) whose fees for the representation of Mrs. Ettress were to be paid for by Mr. Lewis (79c).

Mr. Lewis, while under oath in the Bankrupcy Court, testified that his settlement made him a receiver (18a), the very thing that the Circuit Judge designed as unethical and refused to approve. Later, when this was exposed he testified that "A. We did not end up doing it exactly that way . . . No, I was a Trustee then, not appointed a receiver" (18a, 19a).

The bankruptcy referee observed in his opinion after hearing all of the evidence: ". . . Mr. Lewis was not operating the bar as a court appointed receiver or trustee . . ." (20a).

HEARINGS BY THE CITY COMMISSION

The Grand Rapids City Commission works with the Committee System (59a). The commission to which Liquor License matters are referred is called the Safety Committee.

On January 11, 1962, petitioner Lewis, with his suit against his client in check by an alert and able judge (179a, 180a), demanded a hearing before the Safety Committee (60a). Five days later, on January 16, 1962, the next regular meeting after his demand he was accorded his first hearing, which he attended (60a, 154a). No one gave any indication of prejudice or animus or discriminatory behavior (68a, 129a, 154a), and Mr. Lewis was allowed to and he did make statements with reference to his application (60a, 90a). The matter of Mr. Lewis' action against his client was discussed (154a) and the application was tabled in order to enable the attorney-member of the Committee to examine the Circuit Court file (155a, 293a, 294a, 295a). The investigation by Commissioner Sevensma convinced him that "my suspicion as to the correctness and the ethics of this matter . . . seemed to me that he, that is, Mr. Lewis, stood in an untenable position (157a).

During March meetings of the Safety Committee, attorney-applicant-manager and plaintiff Lewis produced "settlement documents" (74a). In the meantime Attorney-Commissioner Sevensma consulted with Circuit Judge Hoffius who had the case assigned to him (170a). In March the meetings which Mr. Lewis attended related to discussions concerning unpaid taxes on the Bar which were the responsibility of Mr. Lewis, the Manager (45a, 76a, 90a). Tax delinquencies of all bars in the City was discussed, including that of the bar of which Mr. Lewis was the manager. (92a). Mr. Lewis admitted that he had the *power* to pay taxes (102a). At the time of the trial of this case the taxes chargeable to Mr. Lewis were still unpaid (45a, 46a). The payment of taxes was the subject of about every meeting (76a). The Committee was concerned with the demonstration of poor citizenship and concern for obligations on the part of the Attorney-Manager-Applicant (76a).

At the July 24th, 1962, meeting the recommendation of Superintendent of Police William Johnson was requested and he recommended against transfer to Mr. Lewis, citing as reasons Lewis' failure to pay taxes and his variety of relationships in the bar (187a, 229a).

Dr. VandenBerg was shocked and astonished with the position of Lewis in relation to Mrs. Ettress and concluded that "the person who is managing that Bar is incompetent or dishonest, or he is more interested in himself than his client" (200a). Dr. VandenBerg's concern was clearly expressed to and in the presence of Mr. Lewis and Dr. English (applicants and Patricia Ettress (239a). Mr. Lewis was given an unusual amount of time to explain his position (60a).

On July 31, 1962, the Safety Committee met and considered the application (194a, 195a). It had heard the Lewis story over and over again (22a). It had heard the views of Dr. English (346b). It had heard the views of Chief Johnson in the presence of Mr. Lewis and Dr. English (239a). Members of the Commission had expressed themselves to Mr. Lewis (240a). The decision to recommend to the Commission against the transfer was not arrived at in the presence of Mr. Lewis (194a-197a). The Committee presented its recommendations to the full Commission giving its reasons therefor (95a, 96a, 141a, 159a, 199a). The full Commission had the benefit of reports previously made as well (129a, 130a). Mr. Barto, the chairman made the report giving reasons (131a, 132a, 159a, 160a, 199a).

The Grand Rapids City Commission unanimously adopted a resolution denying the transfer (70a, 95a, 199a).

Mr. Lewis, who had sued his client, had no further interest in the transfer of the license (269a). Mr. Lewis sought to be heard repeatedly thereafter, demanding hearings of a trial type (121b, 122b). Mr. Lewis' right to be heard had ceased but he insisted upon appearing at subsequent meetings (156b).

The Court of Appeals concluded that there was no appeal relating to revocation. As stated by Judge O'Sullivan,

> "5. We do not reach the question of whether Lewis or the trustee in bankruptcy were denied due

process or equal protection of the law by the revocation of the license for Barnett's Bar. The appeal does not present such question." (356 *F. 2nd* 276, at p. 296; Appendix C p. 120c to Petition).

It is submitted therefore that *all* of Appendix A to the "Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit" as contained in pages 399b to 424b, being hearings held on November 7, 1962 (399b) and November 13, 1962, (410b) are superfluous and immaterial.

I.

Local Legislative Body Was Not Required To Provide Petitioner A Full Dress, Trial Type, Hearing On His Application For A Liquor License Transfer.

In its discussion of the question of whether or not Mr. Lewis had been denied due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, the Court of Appeals stated:

"* * * . . . The evidence makes clear that he was given repeated hearings with opportunity to present and argue his own position. The things which made him unacceptable as a transferee — the tax delinquencies and the closing of the Bar — the history of gambling — a generally poor operation under his management — and his relations with his client, highlighted by his lawsuit against her were known to him and to the Commission. Although not set forth in a formal charge, they were the subject of much discussion."

"Lewis contended that a plea of guilty to possession of gambling equipment at '58-60 Ionia Ave.' was not proof that Barnett's Bar located in the building carrying such address, was the site of, or involved in, the 'numbers' enterprise. Except for that, neither at any hearing before the Safety Committee, at any other revocation hearings or at the trial of the case in-

volved did Lewis make substantial contest of the underlying truth of the events detailed herein and which prompted the Commission's disapproval of him as a transferee. Whatever explanations he offered at the trial had already been made to the Safety Committee. He has not told what evidence he would, or might have offered or developed,, if a more formal type of hearing had been held." (102c, 103c, 104c, 105c and 356 Fed. 2nd at 287, 288).

The Court of Appeals held under the circumstances that Mr. Lewis had been afforded due process.

A. *A Holding Not In Conflict With Decisions Of This Court.*

The above holding is consistent with previous decisions of the United States Supreme Court.

> "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. * * * The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. * * *."
>
> *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961), at 894, 895.

As stated by Mr. Justice Goldberg in his concurring opinion in *Willner v. Committee on Character,* 373 U.S. 96 (1963), at 107:

> "* * * As I understand the opinion of the Court, this does not mean that in every case confrontation and cross-examination are automatically required. It must be remembered that we are dealing, at least in the initial stage of the proceedings, not with a court trial, but with a necessarily much more informal inquiry into the applicant's qualifications for admission to the bar. Circumstances will determine the necessary limits and incidents implicit in the concept

> of a 'fair' hearing, Thus, for example, when the derogatory matter appears from information supplied or confirmed by the applicant himself, or is of an undisputed documentary character disclosed to the applicant, and it is plain and uncontradicted that the committee's recommendation against admission is predicated thereon and reasonably supported thereby, then neither the committee's informal procedures, its ultimate recommendations, nor a court ruling sustaining the committee's conclusion may be properly challenged on due process grounds, provided the applicant has been informed of the factual basis of the conclusion and has been afforded an adequate opportunity to reply or explain. Of course, if the denial depends upon information supplied by a particular person whose reliability or veracity is brought into question by the applicant, confrontation and the right of cross-examination should be afforded. * * *''

For a discussion of varying types of hearings acceptable under the Due Process Clause of the Fifth and Fourteenth Amendments, see Davis, The Requirement Of A Trial-Type Hearing, 70 Harv. L. Rev. 193.

As expressed by one City Commissioner:

> "We talked about the taxes, I think, at every meeting in which he was in attendance" (76a).

The City Clerk who was called by Mr. Lewis testified that Mr. Lewis had attended several of the sessions of the Safety Committee Hearings; that he was allowed to make statements with reference to his application and that Mr. Lewis was asked questions to which he made answers (60a).

Mr. Barto, Chairman of the Safety Committee, testified that he tried very hard to conduct orderly meetings; that everyone was given "ample opportunity to present their case"; that the matter of taxes was discussed; that Mr. Lewis was recognized and heard repeatedly and allowed to make statements (90a); that he advised Mr. Lewis that Dr. English would be acceptable as a transferee (92a); that there were discussions at Safety Committee meetings

at which Mr. Lewis was present concerning his management of the bar (93a) and that there was discussion concerning gambling activity at the bar while Mr. Lewis was the manager (94a).

Mr. Sevensma (attorney-member of the Commission) remembers how Mr. Lewis accused the Chief of Police of lying at the April meeting (158a); that he had a personal discussion with Mr. Lewis in January or February about the application at which Mr. Sevensma made a request for information (167a).

Commissioner Vanden Berg, then a Professor at the University of Michigan, testified:

> "You told us frequently, Mr. Lewis, that you were the attorney in fact, had power of attorney and you were running the bar. This is what you told us: You hired, you fired, you controlled the till and you were in charge" (207a).

Further, that Mr. Lewis did *not* request reasons prior to July 31st (207a).

In his appearance at Court, Dr. Cortez A. English remembered very well that there was an animated discussion on the part of several commission members at "transfer meeting he attended" (239a, 240a).

As determined by the Court of Appeals, the facts upon which the Safety Committee based its denial of the application in question were either admitted by petitioner or uncontested by him at the hearings provided (104c, 105c). Although the things that made Mr. Lewis unacceptable were never set forth in a formal charge, they were the subject of much discussion at the hearings provided (103c).

The cases relied upon by petitioner to support his claim that a conflict with applicable decisions of this Court exists are readily distinguishable. In *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926), petitioner's application to practice before the Board was turned down without any hearing or reasons. The holding of the Court was that petitioner was entitled to be heard in a manner consistent with due process, if he demanded it. Just what would constitute due process under

the circumstances is not set forth in the opinion. It is interesting to note that the Court affirmed the dismissal of the petition for mandamus because petitioner had failed to demand from the Board the right to be heard on the charges against him which provided the basis for denial.

In *Greene v. McElroy,* 360 U.S. 474 (1958), the Court was again faced with the situation where petitioner's rights were infringed on the basis of facts provided by persons whom petitioner was not allowed to confront in cross-examination at the hearings provided.

In *Schware v. Board of Bar Examiners,* 353 U.S. 232, (1957), there was no question of whether or not a proper hearing had been provided. The holding of the Court was that there was no evidence in the record which would justify a finding that petitioner was unfit to practice law.

In *Willner v. Committee on Character and Fitness,* 373 U.S., 96 (1963), the Court held that confrontation and cross-examination were requirements of procedural due process where the Committee is relying upon ex parte statements in denying petitioner's application for admission to the bar. This problem was not before the Court of Appeals in the instant case (102c, 103c, 104c, 105c). Also at issue in *Willner* was the fact that petitioner had requested a statement of the reasons for the refusal to certify him and had been refused. Under these circumstances, the Court held that petitioner was entitled to notice of and a hearing on the grounds for rejection. In the instant case, however, there is no claim made by Mr. Lewis that he requested a formal statement of reasons and was refused. In fact, "the things which made him unacceptable as a transferee — the tax delinquencies and the closing of the bar — the history of gambling — a generally poor operation under his management — and his relations with his client, highlighted by his lawsuit against her — were known to him and to the Commission" (103c). The significance of this fact is brought out by *Goldsmith v. United States Board of Tax Appeals,* 270 U.S. 117 (1926), where the Court said at 123:

> "The petitioner as an applicant for admission to practice was, therefore, entitled to demand from the

> Board the right to be heard on the charges against him upon which the Board has denied him admission. *But he made no demand of this kind.* Instead of doing so, he filed this petition in mandamus in which he asked for a writ to compel the Board to enroll him in the list of practitioners, and to enjoin it from interfering with his representing clients before it. He was not entitled to this on his petition. *Until he had sought a hearing from the Board, and denied it, he could not appeal to the Court for any remedy* and certainly not for mandamus to compel enrollment. * * *" (Emphasis provided.)

The *Goldsmith Case, supra,* makes it clear that until petitioner requests a formal statement of reasons for the denial of the transfer and a hearing to try and explain them, he has no standing in Court to claim a denial of due process based upon *Willner v. Committee on Character and Fitness, supra.* The Court of Appeals was not faced with a demand for, and refusal to give, a formal statement of reasons, as in *Willner, supra,* in deciding that procedural due process had not been denied petitioner in the instant case.

Another important factor to be considered is set forth in *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961), at 895:

> "As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of a precise nature of the government function involved as well as of the private interest that has been affected by governmental action. Where it has been possible to characterize that private interest (perhaps in oversimplification) as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required." (Citations omitted).

The decision of the Court of Appeals below takes into consideration "The traditional municipal interests in re-

gulating the liquor business, together with the problems of conducting this regulation through competent, civic-minded, part-time officials'' (102c).

In *Crowley v. Christensen,* 137 U.S. 86 (1890), this Court recognized the potential danger to the community created by a liquor establishment and the consequent compelling reason for vesting the regulatory authority involved with wide latitude and discretion in liquor licensing matters.

B. *Holding Not In Conflict With Another Court Of Appeals.*

Petitioner contends that the decision of the Court of Appeals in this case conflicts with the holdings in *Minkhoff v. Payne,* 210 F. 2d 689 (C.A.-D.C., 1953), and in *Hornsby v. Allen,* 326 F. 2d 605 (1964).

In *Minkhoff, supra,* there was no question raised about the form of the hearings provided. The only question decided was whether or not the findings of the Board was so arbitrary or capricious, or unsupported in the evidence, as to be discriminatory. The decision affirmed a summary judgment in favor of defendant.

In *Hornsby, supra,* plaintiff alleged that her liquor license application was denied without reason and that such denial was arbitrary unreasonable, unjust, capricious and discriminatory. The Trial Court dismissed her complaint. The Court of Appeals held only that the complaint stated a cause of action and that the District Court should take proofs to determine whether due process and equal protection had been afforded by the Board in making its determination. The dicta set forth at page 608 regarding the type of hearing that would satisfy procedural due process was not necessary to the decision made and was rendered without benefit of evidence regarding the procedure actually used and the source of the facts relied upon by the Board in making its determination.

II.

The Provisions Of The Michigan Administrative Code And The Administrative Procedures Act Are Not Applicable To Local Legislative Bodies.

Petitioner contends that the Michigan Administrative Code and Michigan Administrative Procedures Act apply to local legislative bodies acting on liquor license transfer applications. Although it is difficult to understand the petitioner's conclusions from this contention, the matter can be quickly put to rest by observing that the Administrative Code and Administrative Procedures Act, as set forth in Mich. Stat. Ann., Secs. 3.560(7)-3.560(18), and Secs. 3.560(21.1)-3.560(21.10), apply only to "State Agencies" and "Agencies" respectively, as defined by the statutes. According to the Administrative Code, Mich. Stat. Ann., Sec. 3.560(7)(1):

> " 'State agency' includes any officer, department, bureau, division, board, authority, agency, commission, or institution of this state *except the judicial and the legislative branches.*" (Emphasis supplied.)

The Administrative Procedure Act, Mich. Stat. Ann., Sec. 3.560(21.1)(1) provides:

> " 'Agency' means any state board, commission, department, bureau or officer, authorized by law to make rules or to adjudicate contested cases, *except* the Workmen's Compensation Commission, the Employment Security Commission, the Department of Revenue, the Public Service Commission *and those in the legislative and judicial branches.*" (Emphasis supplied.)

It is difficult to see how the legislature could have indicated any more clearly that the Act did not apply to local legislative bodies. This intention is made even more clear by the fact that a provision for a notice and hearing before the local legislative body prior to requesting a revocation of a liquor license was added to the statute in 1960. Mich. Stat. Ann., Sec. 18.988. If, as petitioner

contends, such notice and hearing was already required under the Administrative Code and Administrative Procedure Act, what was the purpose of this amendment;

III.

The Reasons For The Denial Of Petitioner's Application For A Liquor License Transfer Were Not Arbitrary, Capricious Or Unreasonable So As To Deny Petitioner Equal Protection.

Petitioner contends that the reasons stated by the respondents to have been the basis for their disapproval of the transfer were arbitrary, capricious and unreasonable. His petition to this Court contains no authority in support of this contention however.

As stated in *Midwest Beverage Co. v. Gates,* 61 F. Supp. 688 (N.D., Ind., 1945), at 692:

> "* * * The legislature cannot use the police power as a subterfuge to do something that it otherwise could not do in the infringement of private interests or the restraint of private rights. *On the other hand if the legislative act is within the permitted area it has some relation to the health, morals, safety or welfare of the public, it is not for the courts to question the policy or wisdom of the statute.*" (Emphasis supplied).

In *Crowley v. Christensen,* 137 U.S. 86 (1890), the Court states at 91:

> "As it is a business attended with danger to the community it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. * * *"

The Michigan legislature has vested the local legislative body with full power and discretion with respect to the approval of liquor license transfers. *Hansen v. Romeo Village Council,* 339 Mich. 612 (1954); *Roodvoets v. Ancer,* 308 Mich. 360 (1944). Accordingly, so long as the reasons relied upon by the respondents for denial of the license are related to the health, morals, safety or welfare of the public, it cannot be said that they are arbitrary, capricious, or unreasonable. This Court made its position clear regarding the extent of judicial review of such matters in *Securities Comm'n. v. Chenery Corp.,* 332 U.S. 194 (1946), where it said at 207:

> "We are unable to say in this case that the commission erred in reaching the result it did. The facts being undisputed, we are free to disturb the commission's conclusion *only if it lacks any rational and statutory foundation...* * * *" (Emphasis provided.)

Considering the wide range of discretion vested in the local legislative body in matters of liquor licensing, it cannot be said that the reasons given for denial of petitioner's transfer application were arbitrary, capricious or unreasonable.

IV.

The Court Of Appeals Was Correct In Holding That The District Judge Had Erred In His Factual Findings Of Discrimination.

Taken from the arena of the emotion that attends hard fought claims and charges and countercharges that are made, the Circuit Court of Appeals properly delineated the facts and made a thorough and searching analysis of the case. Unlike the Trial Judge, the Judges of the Court of Appeals had the benefit of an accurate transcript. More importantly, unlike the Trial Judge, the Court of Appeals had the benefit of weighing *facts* rather than personalities.

A. *The District Judge Erred In Granting A "Temporary Injunction".*

Petitioner Alphonse Lewis commenced his case with an *unsworn* complaint on November 19, 1962 (2a, 6a-10a). Upon the allegations of the *unsworn* complaint, *without* an affidavit or verification of any kind, he obtained a "Temporary Injunction" from the same District Judge who eventually heard the case, all in direct violation of Rule 65(b) of the Federal Rules of Civil Procedure. (12a, "Affirmative Defenses, par. 1 and 2a "Docket Entries"). Not until January 2, 1963, a month and a half *after* filing the complaint and securing a "Temporary Injunction" did petitioner comply with the Rule. (3a: "Docket Entries"). This unique procedure indulged in by the District Judge becomes more significant when it is recognized that Grand Rapids City officials are located within one block from the Federal Court.

B. *The District Judge Erred In Pre-Trial. February 1, 1963.*

On February 1, 1963, the District Judge announced that the "Chief of Police particularly made a strong case against the City" (31a) and resorted to some peculiar "documentation":

> "THE COURT: Well, then there was a series of vigilance and undercover men operating in the area and no proof of violations. This coupled with the attitude of the Chief. . ."

How it was possible for the District Judge to make this determination is most difficult to understand. There was available to the Court all the evidence that subsequently was produced at the trial that proves the utter falsity of the Judge's conclusion.

The raid on Barnett's Bar was precipitated by a tip-off on gambling at that location by a negro police sergeant.. It was reported by the negro police sergeant to the Chief

of Police (234a). The negro police sergeant had *not* been sent into the area by the Chief "or anybody in the police department" (235a). The raid was preceded by a visit to the bar by *one* person, a negro officer brought in from Saginaw, Michigan, who actually saw, observed and *witnessed* gambling being conducted at the bar in which the bartender participated over a period of days. (Ex. No. 71, 291a).

The police sergeant who first reported the activities to the chief has, upon many occasions been on "loan" to other police departments for similar services (238a). Likewise, the practice has extended to establishments operated by white skinned people leading to raids and arrests (221a).

The further statement by the Trial Judge on February 1, 1963, is significant:

> ". . . there is strong evidence that the Chief of Police particularly made a strong case against the City, a very strong case against the City on his own appearance, on his own reaction on the stand; it was very adverse. . ."(31a).

As heretofore related, there is no rule, law, holding or statute that requires the approval of the Chief of Police for the granting of or transfer of a liquor license. The Liquor Control Commission (State) has approved of licenses "over the objection of the Police or the Sheriff Department" (42a, 116a, 176a, 230a). The only approval on the local level required is that of the legislative body (42a). Mr. Lewis sent a letter to the City Clerk on January 11, 1962, and five days later he had secured his first hearing from the Safety Committee of the City Commission, the local legislative body (154a, 245a, 246a). The Chief of Police did not have a vote upon the committee and did not rule or dictate to the committee (97a, 192a, 193a, 196a). Nevertheless, the Trial Judge indicated strongly and clearly many months before the actual trial that the *City* would have a heavy burden to overcome in the case and that the unsworn complaint of plaintiff Lewis was going to be accepted as correct.

Pre-Trial Conference May 8, 1963.

At the Pre-Trial conference of May 8, 1963, the Trial Judge observed:

> "In the hearing, one of the things that came out was that the plaintiff had successfully defended people. On the record, it appeared to be a burr under the saddle of the chief of police.
>
> "Now this is not the chief's of police business, nor any of the city's business . . ." (33a).

Again the Trial Judge displayed a strong emotion toward and against the Police Chief and an apparent misconception of the role of the Chief and that of the Commission.

The facts are that the attitude of the Police Chief is a very understandable one. The Liquor Control Act and Rules and Regulations thereof specifically provide against "gambling or gaming devices or paraphernalia of any nature, type or description . . ." (Exhibit H-3, 273). The statute also provides:

> "(b). No licensee, his agent, or employee shall refuse, fail or neglect to cooperate with any law enforcement officer in the performance of such officer's duties . . ." (Ex. H-3, 272a).

Mr. Lewis was the manager of Barnett's Bar by his own act and deed (21a, 100a). He drew up the management documents (Ex. 8-L-R, 277a). He was in control while gambling was taking place at the bar (Ex. HH, 255a). He then defended all of those arrested (Ex. 71, 288a-292a) and eventually appeared with Wesley Calloway who entered a plea of guilty to illegal activity at the building (Ex. W, 248a).

It is not unreasonable to assume that the Chief might be concerned about recommending a man as licensee who was a manager of a business who had tolerated gambling in violation of the law and then put on his "attorney's" hat and successfully represented the gamblers in Court. At least in the eyes of a *policeman* this would appear to be something less than cooperation. In fact, it might

be reasonable for the City Commissioners to have the same fear that Mr. Lewis as licensee might *not* be an improvement over Mr. Lewis-manager.

For a Trial Judge to say *before trial* that "this is not the Chief's of Police business, nor any of the city's business" (33a) did not put the case in a posture for an objective hearing or decision.

C. *The District Judge Erred In Trial.*

The District Judge repeatedly revealed his basic attitude toward the trial in the following statement:

> ". . . you have only three negro establishments in a city of 200,000. You have an intensity of surveillance of this establishment . . ." (105a).

When the judge advised "settlement" he stated:

> ". . . Now, I think I have made this observation clear, that there is not any question about it, that this license should continue and it should continue as a negro operated licensed establishment" (117a).

The statements of the Court reveal several basic and erroneous generalizations:

(1) That there must be a large negro population in Grand Rapids ("City of 200,000").

(2) That there was an "intensity of surveillance of this establishment".

(3) That whatever violations there might be, the bar was going to remain open, and, if need be in the hands of a violator.

(4) That a bar must be negro owned and operated as a matter of service or right for negroes generally;

(5) That negroes cannot be properly served unless a bar is negro operated and owned.

It is submitted that the Trial Judge at an early hour set an objective in the outcome of the case that eventually led him to rejecting anything that was said under oath by at least nine responsible people and accepting anything that was claimed by Mr. Lewis.

D. *No Racial Discrimination Shown.*

When Mr. Lewis filed his unverified (and unsupported) complaint on November 19, 1962, (upon which he illegally received an injunction from the Trial Court) he made no claim of racially inspired discrimination (6a-10a). It was not until January 2, 1963, some six weeks later as an afterthought that it was added (17a). In the course of the trial Mr. Lewis called several witnesses.

Lewis Witness — Andrew J. Spyk.

Mr. Spyk was an investigator for the Michigan Liquor Control Commission. He had no contact with the City Commission. He had considerable contact with the Chief of Police. His conclusions as to the Chief were:

> "A. He did not discriminate against Mr. Lewis" (44a).

Lewis Witness — Richard Loughrin.

Mr. Loughrin, a former prosecuting attorney, testified concerning the Chief:

> "A. In my opinion he had never displayed any bias toward Mr. Lewis . . . Never any reference to Mr. Lewis as a member of any race" (44a).

Lewis Witness — Dr. Cortez A. English.

Dr. English was a negro (78a). He testified that Mr. Barto (Chairman of the Safety Committee) advised him that ". . . he didn't think I would have any trouble getting it by myself" (239a).

As to the Chief of Police, Dr. English testified that Mr. Lewis ". . . didn't have the right temperament, or something to that effect, to run a bar . . ." (239a).

Lewis Witness — Dred Scott Madison

Dred Scott Madison, a negro, had been a segeant on the police force. He had been demoted by the Chief of Police after a hearing before the Civil Service Board (233a, 234a). As to bias by the Chief, he testified:

> ". . . I couldn't believe he was biased against me himself" (233a).

Independent Witness — Dr. James B. McKee

Dr. James B. McKee, a Professor of Sociology at Michigan State University had prepared a book after extensive investigation in the Grand Rapids area, entitled "Negro Leadership in Grand Rapids", identified as Exhibit QQ (173a). He worked with the Human Relations Commission in Grand Rapids in its preparation (175a). Dr. McKee was a member of the American Civil Liberties Union. When the *defendants* (Counsel for the City) sought to interrogate an *independent* witness on the subject of discrimination among the officials of the City of Grand Rapids and have his findings introduced for consideration the attempt was met by a violent objection by Mr. Lewis and sustained by the Court (176a, 240a).

Independent Witness — Arthur Arens.

Arthur Arens was District Supervisor for the Michigan Liquor Control Commission. He found Lewis to be very uncooperative in his investigation (111a). He testified that he has never, in his frequent conversations with the Chief of Police found any display of animus, bias, or anger toward Mr. Lewis (114a).

The Defendants.

The decision of the Court of Appeals properly sets forth the personal history of each of the Commissioners (356 *Fed. 2nd* at 296 and 119c). Regrettably, as each Commissioner stood his ground in this case, relying on the fact that the City Attorney had advised that no reasons had to be given, the Trial Judge accused them of duplicity. (222 *Fed. Supp.* at 372; 57c). The Judge questioned their integrity (57c). As stated by the Court of Appeals:

> "To sustain a finding that denial of Lewis' application was the product of racial or other discriminatory motive would require us to leave unreversed a holding that commissioner VandenBerg's above recital was but a perjurious mask to hide his real and vicious motives. We cannot do so" (119c).

The best answer to the unfounded charge by the Trial Judge was given by Mr. Lewis himself several months before trial at one of the Trial Judge's "Pre-Trial" conferences:

> "Mr. Lewis: . . . the safety committee approved of Dr. English, the chief of police approved Dr. English. All of the hearings were directed to me personally . . ." (32a).

Mr. Joseph Sypniewski testified:

> ". . . I would like to have this bar stay with the negro people. They are entitled to it and I will do my best to make sure it stays in that race" (251b).

Mr. Jamo approached Mr. Lewis after the action taken by the Commission on July 31st and suggested even then that he get Dr. English to apply and that Dr. English would be acceptable to the City Commission (130a, 131a, 143a).

The conduct of the Commission at the *time of the hearings* clearly demonstrates that they were *not* racists. The facts of the case clearly show that Mr. Lewis has sought to perpetrate a fraud and uses his race to do so.

Race was injected into the case by Mr. Lewis as an afterthought. Mrs. Lamberts discussed City problems frequently with Mr. A. Cowles, Director of Human Relations and a negro (82a). Mr. Jamo had discussions with Mr. Cowles and had been the recipient of a commendation from the local chapter of the N.A.A.C.P. (121a). Mr. Sevensma had actively supported the candidacy of a negro for Municipal Judge against two "white" opponents (166a).

The District Judge decided that Mr. Lewis was going to have his client's license no matter what his past conduct might be. The Trial Judge had the benefit of Mr. Lewis' perjured testimony in the Bankruptcy Court in which Mr. Lewis testified that he had been appointed as a receiver pursuant to Circuit Court proceedings (18a) when, in fact, the Circuit Judge had rejected his callous attempt to wring it from his client (179a). The District Judge was not interested in hearing the truth of Mr. Lewis' active participation in gambling at Barnett's Bar prior to the raid (148a, 241a). The District Judge heard Mrs. Ettress *off the record in chambers.* The District Judge would not hear another witness' account of Mr. Lewis' gambling activities while manager at the Bar (241a). The District Judge advised that it would not receive such evidence because "that was not disclosed to any member of the police department, or to any member of the City Commission . . ." (241a). True, but it was *available* for consideration by the District Judge before he chose to substitute *his* judgment for that of the Commission.

Counsel for the defendants made plain to the Trial Judge repeatedly the significance of such testimony (151a).

What the Trial Judge decided was that if *he* found that the local legislative body had denied due process and equal protection to a person, then that person, no matter how despicable, no matter how unqualified, no matter how unfit, would receive the license (152a, 241a). The Court refused to appraise and assess Mr. Lewis as a licensee because it refused to allow the truth about him to be shown (151a, 152a, 241a).

Fortunately, the Court of Appeals considered the facts devoid of emotion and made objective findings which were supportable.

V.

The Question Of Due Process Has Become Moot As A Result Of The Bankruptcy Of Licensee.

On March 20, 1962, as the result of a lawsuit by petitioner Lewis against his former client, Patricia Ettress entered into an executory contract with Lewis whereby she agreed, among other things, to transfer him her interest in the liquor license in question in return for the release of her indebtedness to Lewis resulting primarily from his manager's fees, attorney's fees and loans (75c). The executory nature of the contract is made clear by the provision that:

> "* * * This agreement shall be subject to the transfer of the license from second party to the first party or his assigns, by the Michigan Liquor Control Commission and that no money shall be paid out in connection with this agreement except as herein provided until the transfer of said license is so approved and transferred to first party."

On September 10, 1962, Patricia Ettress, then Patricia Ettress Bell, filed a voluntary petition in bankruptcy (69c). On October 15, 1962, Mr. Lewis and Dr. English were ordered to show cause why the Trustee in Bankruptcy should not be declared the owner of the license(69c). A hearing was held on November 1, 1962, and the Referee in Bankruptcy entered an order declaring that Trustee was the owner of the license free and clear of any claim of Mr. Lewis or Dr. English (69c, 8a). On November 7, 1962, Mr. Lewis filed a petition for a review of this order and by agreement between the Trustee and Mr. Lewis, the District Judge below undertook to hear this petition along with the rest of the instant case (69c). The District Court affirmed the holding of the Referee in Bankruptcy that the sole owner of the license was the Trustee (69c).

When Patricia Ettress filed bankruptcy on September 10, 1962, the executory contract for the transfer of the license became subject to the provisions of the Bankruptcy

Act. Section 70 (b) of the Act, being 11 U.S.C.A., Section 110(b), provides in part:

> "Within sixty days after the adjudication, the Trustee shall assume or reject any executory contract, including unexpired leases of real property: *Provided, however,* That the Court may for cause shown extend or reduce such period of time. *Any such contract or lease not assumed or rejected within such time, whether or not a Trustee has been appointed or has qualified, shall be deemed to be rejected.*" (Emphasis provided.)

There is nothing in the record indicating that the Trustee in Bankruptcy assumed the executory contract in question. On the contrary, the Trustee petitioned the Referee in Bankruptcy for an order declaring that said license was free and clear of any interest of the petitioner, Alphonse Lewis, Jr., and the order was granted. Subsequently, the District Court affirmed this order with the exception that the Trustee's ownership was "still subject to the lawfully pending transfer to Mr. Lewis and Dr. English" (69c, 70c). The District Court overlooks the fact that there was no pending transfer between the Trustee and Mr. Lewis and Dr. English. The executory contract of March 20, 1962, regarding the transfer of the license has been rejected and the Trustee is free to sell the license to whomever he chooses at the best price available. To hold otherwise would force the Trustee to accept a burdensome executory contract at the expense of the other general creditors, contrary to well-established bankruptcy law. *Bank of America National Trust and Savings Ass'n. v. Smith,* 336 F. 2d 528 (C.A.-9, 1964); *Gulf Petroleum, S.A. v. Collazo,* 316 F. 2d 257 (C.A.-1, 1963). Even it the license transfer had been approved on July 31, 1962, the Trustee in Bankruptcy would have been entitled to set aside the transfer as a preference. 11 U.S.C.A., Section 96. The preferential nature of the transfer is clearly indicated by the fact that the major portion of the consideration of said transfer was the release of unsecured claims by Mr. Lewis against Mrs. Ettress. However, because no transfer had taken place prior to the bankruptcy, the Trustee performed

his duty toward all of the creditors by merely rejecting the transfer agreement.

It is undisputed that the Trustee is the present owner of the license. The law is settled that the Trustee may reject a burdensome executory contract. There is no evidence of any valid and existing transfer agreement between Mr. Lewis and the Trustee. Accordingly, respondents contend that even if this Court should find that the hearings leading up to the July 31, 1962, disapproval of the transfer application failed to provide due process, the question has become moot as a result of the bankruptcy of the licensee and the Trustee's rejection of the burdensome executory contract. In short, there is no longer any pending transfer to hold hearings on.

CONCLUSION

WHEREFORE, upon the grounds shown hereinbefore, it is respectfully urged that the Writ of Certiorari be denied.

Respectfully submitted,

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